(3)

Supreme Court, U.S.
FILED
SEP 20 1991
OFFICE OF THE CLERK

NO. 91-37

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

BONNIE J. CLEMENCE, et als.,

Petitioners,

-vs-

CHARLES CLEMENCE AND DOUG CLEMENCE,
AS REPRESENTATIVES OF THE ESTATE OF
OF ROY A. CLEMENCE, DECEASED.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PETITIONERS

BONNIE J. CLEMENCE, Pro Se
LONTIE J. CLEMENCE, Pro Se
KAREN K. CLEMENCE, Pro Se

3012 West 89th Terrace
Leawood, Kansas 66206
(913) 649-1721

QUESTIONS PRESENTED

I.

WHETHER: grantor's complaint for declaratory judgment affirmatively pleads the espress terms of the divorce decree as res judicata on the question of whether the deed is invalid; this — not to collaterally attack the prior federal holding (itself "consumed" in the divorce decree) or to establish who owns the over 5,000 acres of prime Kansas real estate described in the deed — but simply to conclude her former husband's asserted ownership in defense of her claim that her deed is valid?

II.

WHETHER: because both courts in the prior and contemporaneous litigation expressly reserved, each to the other, any consideration of the question of whether the deed is invalid, grantor therefore had absolutely no opportunity during the prior litigation in either court, to defend her claim that her deed — wherein she alone is grantor — is valid; if so, whether due process therefore requires that grantor's claim that her deed is valid survive the entry of the divorce decree in tact?

III.

WHETHER: because it expressly reserved any consideration of the question of whether the deed is invalid to the federal court, the divorce court therefore did not set the deed aside – and hence did not use either the collateral estoppel effect of the prior federal holding or its own restraining order to set the deed aside?

AND WHETHER the lower courts' failure to recognize this, directly contradicts the express terms of the divorce decree's provisional award – thereby turning its proper res judicata effect on its head and conflicting with K.S.A. 23-201(b) and K.S.A. 60-1610 (b) and with Kansas Supreme Court decisions in Cady and in Washoltz, holding that, the ability of a spouse to convey property is limited, if at all, only to the extent provided for by the divorce court in making its final disposition of the marital estate via the express terms of its final decree?

IV.

WHETHER: because a deed remains valid unless and until it is set aside, the result of each court having reserved to the other, any consideration of the question of whether the deed is invalid, is that the deed was not set aside and thus remains valid; if so, whether the divorce decree's "consumption" of that question — by the rule of res judicata — therefore operates to preclude husband's asserted ownership, rather than grantor's claim that her deed is valid?

V.

WHETHER husband's assertion that grantor challanges 10th Cir. R. 34 and/or Fed.R. App. P. 34 is a total fabrication (apparantly designed as a smokescreen calculated to misdirect this court's attention from the issues in this case)?

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B. The 10th Circuit decision in this case conflicts with K.S.A. 23-201 (b) and K.S.A. 60-1610(b) and with Kansas Supreme Court decisions in Cady and in Wachholz, establishing that a spouse's ability to convey property is limited, if at all, only to the extent expressly provided for by the final divorce decree 6

C. Because a deed is valid unless and until it is set aside, the divorce decree's "consumption" of the question of whether the deed is invalid – by the rule of res judicata – operates to preclude husband's asserted ownership, rather than grantor's claim that her deed is valid 7

II. Husband's assertion that petitioners challenge 10th Cir. R. 34 and/or Fed. R. App. P. 34 and that husband's assertion to the contrary, is therefore a total fabrication, apparently designed to misdirect this court's attention from the real issues in this case.)

(The record speaks for itself, to establish that petitioners do not challange 10th Cir. R. 34 and/or Fed. R. App. P. 34 and that husband's assertion to the contrary, is therefore a total fabrication, apparently designed to misdirect this court's attention from the real issues in this case.)

TABLE OF AUTHORITIES

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Dissent from 10th Cir. Ct. R. 36.3, by Chief Judge Holloway, Judges Barrett, and Baldcock, at U.S. Court of Appeals, 10th Circuit, Rules, App.III, 28 U.S.C.A. (West Supp. 1988) (Appendix at 94)

JURISDICTION

Contrary to husband (respondent), the jurisdiction of this Court is invoked under 28 USC Section 1254(1) and petitioners have fully complied with all applicable provisions of the rules of this court.

CONSTITUTIONAL PROVISIONS STATUTES AND RULES INVOLVED

1. U.S. Const., amend V, provides in relevant part:

> No person shall be ... deprived of life, liberty, or property without due process of law ...

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2. 10th Circuit Court Rule 36.3 provides:

Citation of Unpublished Opinions/Orders and Judgments. Unpublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. A dissent from this rule by Chief Judge Holloway, Judges Barrett, and Baldcock, appears at U.S. Court of Appeals, 10th Circuit, Rules, App.III, 28 U.S.C.A. (West Supp. 1988).

3. K.S.A. 23-201(b) provides:

All property owned by married persons, whether described in subsection (a) or acquired by either spouse after marriage, and whether held individually or by the spouses in some form of co-ownership, such as joint tenancy or tenancy in common, shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment. Each spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 1980 Supp. 60-1610 and amendments thereto.

4. K.S.A. 60-1610 (b) provides, in relevant part:

Decree; authorized orders. A decree in an action under this article may include orders on the following matters: .... (b) Financial matters. (1) Division of property. The decree shall divide the real and personal property of the parties ....

STATEMENT OF THE CASE

This is a truly extraordinary case wherein both a state and federal court, in prior and contemporaneous litigation, labored under K.S.A. 23-201(b) and K.S.A. 60-1610 (b) in making disposition of the marital estate pursuant to HUSBAND's state court petition for divorce against GRANTOR. Appendix at 38 . Both the state and federal court in this prior litigation expressly reserved, each to the other, any consideration of the question of whether a certain general warranty deed[1] to over 5,000 acres of prime Kansas real estate, is invalid: the state court, because it was without the requisite in personam jurisdiction over the deed's grantees and the federal court, because it was without the requisite in personam jurisdiction over the deed's GRANTOR. Appendix at 9-18 . GRANTOR therefore had absolutely no opportunity in the prior litigation in either court to defend her claim that the deed, wherein she alone is grantor[2], is valid. Thus, due process requires that grantor's claim that her deed is valid survive the entry of the divorce decree in tact; while at the same time, the rule of res judicata operates — via the divorce decree's "consumption" of the question of whether the deed is invalid — to conclude husband's asserted ownership of the lands therein described.

Nevertheless, HUSBAND claimed the lands described in the deed as property of his bankruptcy estate — in contentious opposition to grantor's claim that her deed is valid. GRANTOR

[1] Appendix at 1 .

[2] Per the express terms of her inter vivos trust, Article I, P. A. Appendix at 5,6,

was thus forced to file her complaint for declaratory judgment by which she affirmatively pleads the express terms of the divorce decree's provisional award as res judicata, on the question of whether the deed is invalid. This – not to collaterally attack the prior federal holding (itself "consumed" in the divorce decree) or to establish who owns the lands described in the deed – but simply to conclude her former husband's asserted ownership in defense of her claim that her deed is valid. Appendix a -68;69-78.

The 10th Circuit decision in this case concludes that the collateral estoppel effect of the prior federal holding operates under the divorce decree's provisional award to transfer ownership, from GRANTOR to HUSBAND, so that the res judicata effect of the divorce decree thereby precludes grantor's claim that her deed is valid – rather than husband's asserted ownership. Appendix at 88 . . It thus fails to recognize that because the divorce court expressly reserved any consideration of the question of whether the deed is invalid to the federal court it therefore did not use the collateral estoppel effect of the prior federal holding to set the deed aside – and the deed thus remains valid – so that the divorce decree's provisional award, in its effect res judicata to "consume" the prior federal holding, therefore concludes husband's asserted ownership, rather than grantor's claim that her deed in valid.

ARGUMENT

I. Due Process requires that grantor's claim that her deed is valid survive the entry of the divorce decree – while at the same time, it compels enforcement of the rule of res judicata to conclude husband's asserted ownership.

The due process clause of the Fifth Amendment acts as a check on federal power in refusing or extending the effect of res judicata; it does not permit GRANTOR to be arbitrarily stripped of the protection afforded her by reason of the res judicata effect of the divorce decree's provisional award; and it requires that grantor have had an opportunity at some point in the prior litigation to defend her claim that her deed is valid in order for any judgment entered therein to be extended to preclude her on that claim. Hansberry v. Lee, (1940) 311 US 32, 61 S Ct. 115, 85 L ed 22. Since both courts in the prior litigation contemporaneously and expressly reserved, each to the other, any consideration of the question of whether the deed is invalid, grantor therefore had absolutely no opportunity in the prior litigation in either court to defend her claim that her deed is valid. Hence, due process requires grantor's claim the deed is valid survive the entry of the divorce decree – while, at the same time, it compels enforcement of the rule of res judicata to conclude husband's asserted ownership (as discussed infra at 7-9).

The efforts of the lower federal courts in this case to extricate husband from the express terms and res judicata effect of the divorce decree (as discussed infra at 5-7) therefore constitute, not "doing equity," but a truly egregious denial of due process of law as to grantor.

It should be remembered that husband placed himself in this position. For, as the referee in the prior federal proceeding stated at the rest of plaintiff's case in chief, he at that point had a problem with the case, in that it had just come to his attention that plaintiff (husband) had failed to name and serve defendant (grantor) and that the defendant was therefore not a party, and so

could not be bound on an in personam basis, res judicata, by the judgment to be entered therein. Apendix 9-18. Hence, the prior federal determination's specific conclusion: *"Bonnie Jean Clemence, the debtors' mother and the alleged transferor/donor, was not a party to this action and ... she was not represented."* Appendix at 43 . Thus since grantor is neither party to nor represented in the prior federal proceeding; the collateral estoppel effect of the prior federal holding cannot be extended to grantor. Id.

Husband's attorney blamed the court for husband's failure to name and serve the defendant and urged the court to nevertheless proceed to a determination on the question of whether the deed is invalid — by pretending that the defendant (grantor) had died. Appendix at 11 . Unmoved, the referee stated that the court could not consider the allegations made by husband, but reasoned:

> *If I get it out of this estate, it then becomes some other court's problem as to whose property it is ... In other words, you might be able to go back from the kids to Bonnie's Trust, which for the divorce purposes is really all you need anyway. Appendix at* 14

The referee thus proceeded sua sponte on the sole basis of the **then indeterminate** "species" of marital interest under K.S.A. 23-201(b) and K.S.A. 60-1610(b) as discussed in Cady[1],

[1] The prior federal holding states that the sole basis upon which husband invoked the pendent jurisdiction of the federal court in the prior proceeding was the "species" of marital interest discussed in Cady v. Cady, 224 Kan. 339, 581 P.2d 358 (1978). Appendix at 38 . The nature and extent of which interest is pursuant to K.S.A. 23-201(b) and K.S.A. 60-1610(b), determinable only by the divorce court in making its final disposition of property per the express terms of its final decree. Id.

to place ownership in grantor (on a purely quasi in rem basi pursuant to the court's determination that grantees failed to pro that grantor made delivery to them, under the deed:

> **before June 10, 1982. At that point**, [sic grantor] was enjoined from transferring the property in any manner by the restraining order issued by the state court judge in the domestic relations action. Accordingly, the Court holds that the owner of the real estate is [sic grantor] ... By this Court's holding today, the property is returned to the jursdiction of the state court ... **in light of ... the allegations made by Roy.** [Emphasis Added.] Appendi at 57 .

But while the prior federal holding thus expressly reser any consideration of the question of whether the deed is inva to the divorce court, the divorce court had (unbeknownst to federal court) already entered its final decree by which it — making its provisional award turn on whether the federal court contemporaneous litigation finally determines the deed to invalid — had itself, expressly reserved any consideration of same question to the federal court.

A. Because it expressly reserved any consideration of the question of whether the deed in invalid to the federal court, the divorce court therefore did not use the collate estoppel effect of the prior federal holding to set the dee aside.

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The collateral estoppel effect of the prior federal holding does not operate under the divorce decree's provisional award to transfer ownership, from grantor to husband, so as to thereby preclude grantor's claim that her deed is valid. Assuming it binds grantor[1], the prior federal holding has collateral estoppel effect only to establish that grantor did not make delivery under the deed before June 10, 1982 – and that ownership was therefore in her at the time the divorce court entered its restraining pursuant to husband's petition for divorce against her. This, without more, does not preclude grantor from making delivery under the deed.

Because the divorce court expressly reserved any consideration of the question of whether the deed is invalid to the federal court, the divorce court therefore did not consider the question of whther the deed should be set aside. Hence, the divorce court did not use the aforementioned collateral estoppel effect of the prior federal holding or its own restraining order to set the deed aside. The divorce court's restraining order was abrogated by the entry of its final decree. Kelly v. Kelly, 132 P. 981, 89 Kan. 889. Grantor therefore remains free in the exercise her sole and absolute power and discretion to make delivery under the deed – if not before the divorce court's entry of its restraining order – then after.

B. The 10th Circuit decision in this case conflicts with K.S.A. 23-201(b) and K.S.A. 60-1610(b) and with Kansas Supreme Court decisions in Cady and in Wachholz,

[1] Though in actuality, GRANTOR is not bound by the prior federal holding, as discussed supra at 2-5

establishing that a spouse's ability to convey property is limited, if at all, only to the extent expressly provided for by the final divorce decree.

In failing to recognize that the divorce decree's provisional award expressly reserved any consideration of the question of whether the deed is invalid to the federal court and that the divorce court therefore did not use the collateral estoppel effect of the prior federal holding to set the deed aside, the 10th Circuit decision in this case directly contradicts the express terms of the divorce decree's provisional award. Appendix at 91. This, with the result that its proper res judicata effect is thereby arbitrarily turned on its head.[1]

The 10th Circuit decision in this case therefore conflicts with K.S.A. 23-201(b) and K.S.A. 60-1610(b) and with Kansas Supreme Court decisions in Cady, in Wachholz, holding that, the ability of a spouse to convey property is limited, if at all, only to the extent provided for by the divorce court in making its final disposition of the marital estate via the express terms of its final decree.

C. Because a deed is valid unless and until it is set aside, the divorce decree's "consumption" of the question of whether the deed is invalid – by the rule of res judicata – operates to preclude husband's asserted ownership, rather than grantor's claim that her deed is valid.

[1] Due process does not permit this arbitrary refusal of the res judicata effect of the divorce decree as discussed supra at 3,4 .

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Upon the failure of the federal court to finally determine the deed to be invalid, the divorce decree's provisional award became absolute in it effect as res judicata on the question of whether the deed is invalid. In re Roney, 139 F.3d 175, cert denied Roney v. Fed Land Bank of Louisville, Kentucky, 64 S.Ct. 1265, 322 U.S. 753, 88 L.Ed. 1583 rehearing denied 65 S.Ct. 29, 323 U.S. 810, 89 L.Ed. 645. For, even though the divorce court expressly reserved any consideration of the question of whether the deed is invalid to the federal court, its final decree nevertheless irrevocably "consumed" the question. All rights which either spouse had in the property of the other are extinguished by the final decree. Roberts v. Fagan, 92 P.559, 76 Kan. 536. The divorce decree thus has effect by virtue of the rule of res judicata, to "consume" not only husband's petition for divorce against grantor, but all matters of fact and law in connection therewith – irrespective of whether such matters were considered. Cromwell v. County of Sac, (1877) 94 US 351, 24 L ed 196.

A deed remains valid unless and until it is set aside. Harrison v. Craddock, Tex.Civ.App., 178 S.W.2d 296, 301. So the result of each court having reserved to the other, any consideration of the question of whether the deed is invalid, is that the deed was not set aside and thus remains valid. Hence, the divorce decree's "consumption" of the question of whether the deed is invalid – by the rule of res judicata – operates to conclude husband's asserted ownership, rather than grantor's claim that her deed is valid. Federated Dept. Stores, Inc. v. Moitie, (1981) 452 US 394, 401, 101 S Ct 2424, 69 Led2d 103.

This result is not only required by due process and the rule of res judicata — it is just. Husband, as plaintiff, controlled and

managed the prior litigation choosing the forum and the parties. He thus had two opportunities to fully prosecute his challange to grantor's claim that her deed is valid. He could have named and served grantor in the prior federal proceeding so as to permit that court to consider the question of whether the deed is invalid — but chose not to do so. (Supra at 3,4 .) He could have advised the divorce court of his failure to name and serve grantor as defendant to the federal proceeding, so that the divorce court could have been made thereby aware of the consequent inability of the federal court to determine the validity of the deed; but again, he chose not to do so.

In failing to avail himself of either opportunity, husband failed to successfully prosecute his challange to grantor's claim that her deed is valid and the rule of res judicata therefore operates to conclude his asserted ownership of the lands therein described. Id.

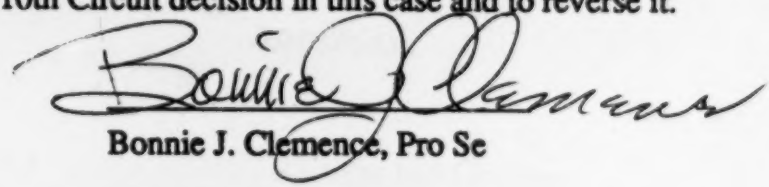
CONCLUSION

Because it is law making[1] in its application of the rule of res judicata, collateral estoppel and law of the case, the 10th Circuit decision in this case, unless it is reversed, shall have precedential value and shall be cited[2] in the 10th Circuit and elsewhere by litigants seeking to circumvent the express terms and proper preclusive effects of prior judgments. This, by having the rule of res judicata applied, as in the instant action, in direct contraction to the express terms of the judgment – so that litigants are thereby allowed to escape the final outcome of prior litigation, resulting in judicial chaos and disbelief.

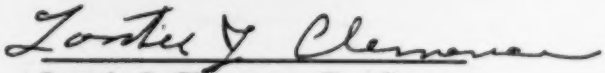
[1] In that it conflicts with controlling legal precedent.

[2] This despite the 10th Circuit's use of its new no publication/no citation rule (10th Cir. R. 36.3) See text of the rule supra at (vii).

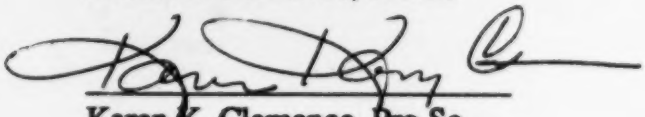
Accordingly, grantor prays that this Court grant Certioari to review the 10th Circuit decision in this case and to reverse it.



Bonnie J. Clemence, Pro Se



Lontie J. Clemence, Pro Se



Karen K. Clemence, Pro Se

APPENDIX

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GENERAL WARRANTY

_____

FROM

TO

_____

Entered in Transfer Record in my office, this 25th day of April A.D. 1983.

S/Yvonne J. Hawkins by Elaine Sidders
County Clerk

_____

STATE OF KANSAS,
Ottawa County,

This instrument was filed for record on the 25th day of April A.D. 1983, at 8:45 o'clock A.M., and duly recorded in Book 72 of Deeds, at page 229

S/B. Martin
Register of Deeds

By_____Deputy.

_____

Fees

Register of Deeds, for recording, $_____
County Clerk for transfer $_____
Total, $ 11.00

THIS INDENTURE, Made this 19th day of May A.D. 1982, between "Bonnie J. Clemence Trust" under the Trust Agreement dated October 20, 1978 as amended by the First Amendment thereto May 19, 1982 their successor or successors in trust of Dickinson County, in the State of Kansas of the first part, and Karen K. Clemence and Lontie J. Clemence of Dickinson County, in the State of Kansas of the second part,

WITNESSETH, That said parties of the first part, in consideration of the sum of One and 00/100 Dollars and other valuable consideration, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto said parties of the second part, their successors and assigns, all the following-described real estate, situated in the Counties of Dickinson and Ottawa and State of Kansas, to wit: SEE ATTACHED EXHIBIT "A" FOR DICKINSON COUNTY LEGAL TRACTS IN OTTAWA COUNTY, KANSAS:

All of Section Fourteen (14), Township Ten (10) South, Range One (1) West of the 6th P.M.

All of Section Ten (10), Township Ten (10) South, Range One (1) West of the Sixth P.M.

All of Section Eleven (11), Township Ten(10) South, Range One (1) West of the Sixth P.M.

TO HAVE AND TO HOLD THE SAME, Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever.

And said Bonnie J. Clemence and Roy Arthur Clemence, Trustees of the "Bonnie J. Clemence Trust" for themselves and their successors and assigns, do hereby covenant, promise and agree, to and with said parties of the second part, what at the delivery of these presents they are lawfully seized in their own right, of an absolute and

indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgements, assessments and incum-

brances, of what nature or kind so ever, and that they will warrant and forever defend the same unto said parties of the second part their successors and assigns, against said parties of the first part, their successors and assigns and all and every person or persons, whomsoever, lawfully claiming or to claim the same.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands, the day and year first above written.

S/Roy Arthur Clemence, Trustee of the "Bonnie J. Clemence Trust" under the Trust Agreement dated October 20, 1978 as amended by the First Amendment thereto
May 19, 1982 their successor or successors in Trust.

S/Bonnie J. Clemence, Trustee of the "Bonnie J. Clemence Trust" under the Trust Agreement dated October 20, 1978 as amended by the First Amendment thereto May 19, 1982 their successor or successors in Trust.

STATE OF KANSAS, SALINE COUNTY, ss.

BE IT REMEMBERED, That on this 19th day of May, 1982, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came Bonnie J. Clemence, Trustee of the "Bonnie J. Clemence Trust" and Roy Arthur Clemence, Trustee of the "Bonnie J. Clemence Trust", Trustees under the Trust Agreement dated October 20, 1978, as amended who are personally known to me to be the same persons who executed the foregoing instrument of writing, and duly acknowledged the execution of the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal on the day and year last above written.

My commission expires 3-15, 1983

S/Loren Harris

Notary Public, Saline County, KS

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Citizens Bank and Trust Co., Abilene, Kansas.

TRUST AGREEMENT

THIS TRUST AGREEMENT is entered into as of this 20th day of October, 1978 between BONNIE J. CLEMENCE, as the "grantor" and the grantor's husband, ROY ARTHUR CLEMENCE, and the said grantor, as the "trustees".

In consideration of the acceptance of this trust by the trustees, and the promise of the trustees to hold the trust estate and perform the duties of the trustees hereinafter set forth, the grantor does hereby grant, convey, transfer, assign and deliver to the trustees all her right, title and interest in and to the property described on Exhibit "A" attached hereto and by reference made a part hereof, which property shall be held by the trustees in trust for the uses and purposes hereinafter set forth.

ARTICLE I

The trust established hereunder shall be known as the "Bonnie J. Clemence Trust" and during the lifetime of the grantor the trust estate shall be held, administered and distributed as follows:

A. The grantor shall have the absolute power to withdraw all of any part of the income and principal of the trust estate at any time or times during her lifetime by giving written notice to the trustees. Also, the grantor shall have the absolute right during her lifetime to authorize and direct the trustees to assign, transfer, pay over and deliver all or any part of the income and principal of the trust estate to any other person or persons. Accordingly, the trustees shall mak such payment, use, application, distribution or accumulation of the income and principal of the rust estate as the grantor may from time to time so direct in writing. In addition, if the

grantor at any time or times during her lifetime is incapacitated and not able to attend to business affairs, then the trustees sshall have the absolute ower to pay to or use for the benefit of the grantor and to pay to or use for the benefit of the grantor's husband, such sum or sums out of the income and principal of the trust estate as the trustees may deem advisable to provide for the care, maintenance and support of the grantor or the grantor's husband, or for any other reason whatsoever. All net income not paid to or applied for the benefit of the grantor or the grantor's husband during any fiscal year shall be accumulated and added to the principal of the trust estate.

STATE OF KANSAS, COUNTY OF SALINE:

The foregoing instrument was acknowledged before me this 20th day of October, 1978, by Roy Arthur Clemence and Bonnie J. Clemence as trustees of the Bonnie J. Clemence Trust.

_____

Notary Public

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	)	Chapter 11
	)	
KAREN KAY CLEMENCE,	)	No. 83-40307
LONTIE JOE CLEMENCE,	)	No. 83-40308
Debtors.	)	
	)	
CITIZENS BANK OF ABILENE,	)	
Plaintiff,	)	
	)	Adversary
vs.	)	Proceeding
	)	
KAREN KAY CLEMENCE,	)	No. 83-0232
LONTIE JOE CLEMENCE,	)	No. 83-0233
Defendants.	)	
	)	
	)	
	)	
ROY ARTHUR CLEMENCE,	)	
Plaintiff,	)	
	)	Adversary
vs.	)	Proceeding
	)	
KAREN KAY CLEMENCE,	)	No. 83-0291
LONTIE JOE CLEMENCE,	)	No. 83-0292
Defendants,	)	
	)	

Volume 1

TRANSCRIPT OF HEARING

PROCEEDINGS had before the Honorable James A. Pusateri, United States Bankruptcy Judge, in the United States Bankruptcy Court for the District of Kansas, U. S. Courthouse, 492 Federal Building, 444 S.E. Quincy Street, Topeka, Kansas, on the 7th day of November, 1983.

(REPORTER'S NOTE: Thereupon, at 3:05 p.m., on Thursday, November 10, 1983, all parties again being present as before, the hearing in the before-captioned matter, reconvenes, and the following proceedings are had.

THE COURT: Well, at this point, I have some problem in this case; and that is, my understanding that Case 0301, which is Mr. Graves' case, is not being heard today.

MR. GRAVES: That was my understanding, your Honor.

THE COURT: That is the only case in which Bonnie Clemence is a party-defendant who has been served. Roy Clemence's case never served Bonnie Clemence. She is not a party-defendant.

I find it somewhat difficult to say how I would void a deed to a non-party. The only possibility, of course, is that you have claimed some form of conspiracy. I am not sure how that works in this. But on that basis. I suspect that there is some tenuous ability to do so. But Bonnie Clemence is not a party defendant.

And you are asking at least in one of the fraud counts to, to void because of fraud perpetrated by a non-party; is that not correct? You have never joined her.

MR. HINKLE : It is our understanding that the Court was going to determine the validity of this deed as to Karen and Lontie in this proceeding.

And when we were up here asking the Court to send this matter back to the State court for resolution of that question, I brought up to the Court that fact that Bonnie was not a party to those proceedings.

THE COURT: To these proceedings?

MR. HINKLE: Yes, to these proceedings. And the Court said that that would not be a problem, that the Court could proceed to determine the validity of this deed, without Bonnie Clemence being a party, as to Karen and Lontie. It is on that basis that we have proceeded.

THE COURT: I am not sure that I recall that.

MR. HINKLE: I specifically stated to the Court that at that point in time we had jurisdiction on all of the parties in Dickinson County, Kansas. We had jurisdiction on Bonnie. And we were ready to go forward and get jurisdiction on Bonnie in this court if it was going to be a problem.

And the Court assured us that that would not be a problem, that the Court could go ahead and decide the validity of this deed as to these debtors.

And our understanding was if it found that these debtors had no interest in that property by virtue of that particular deed, then the matter went back to Dickinson County for a decision by that Court as to the ownership of Roy and Bonnie, where jurisdiction on Bonnie is attached.

Now, we relied on that and proceeded on that from the 29th day of June, I think it was.

THE COURT : Well, I don't specifically recall my saying that I had jurisdiction of Bonnie. I am sure that I said there isn't any question but that I can have. Certainly my jurisdiction is equally as extensive.

It is a question of whether she was made a party is what I am asking. I don't recall. I may have said that. But I certainly don't recall that I ever said that I would be able to bind a non-party –

MR. HINKLE : Well –

THE COURT: – or –

MR. HINKLE : – I don't think that this Court can bind a non-party. We are not asking for you to make a finding here that would bind Bonnie. We are asking for you to make a finding that would entwine Karen and Lontie and Bonnie as to those.

THE COURT: Well, that would be on the basis of some joint wrong doing.

MR. HINKLE: Let's assume that Bonnie had died in the meantime. You couldn't get process on her. I think the Court can still consider her conduct as shown by the evidence and decide the validity of that deed.

THE COURT: You are talking about which, both deeds?

MR. HINKLE: All deeds.

MR. FORBES: The thing as to conspiracy – and I didn't make a motion on conspiracy because – maybe I should have. Maybe I should have raised it at the time of the pretrial.

As I looked at the Pretrial Order, I saw conspiracy was an allegation and not apparently a factual issue. If conspiracy – maybe I am getting off the track now. If conspiracy between these people and their mother to get the execution of the deed is an issue, then I guess I should have included that in my motion. I don't think there is any evidence of any conspiracy.

THE COURT: Well –

MR. HINKLE: Your Honor, another point –

THE COURT: – I would not go that far.

MR. HINKLE: I think, your Honor, conspiracy is obviously an allegation. Also, there is a Pretrial Order where the parties all stipulated that there is jurisdiction to decide this question as to the parties in this court, and that the complaint that Roy filed is to reclaim the property, not really a quiet title action.

We are not trying to bind all parties in the world to this decision. We are trying to reclaim this property as to these debtors. I think the Pretrial Order says that there is jurisdiction sufficient to do that.

I think what the Court is doing is raising a jurisdiction issue when that was all conceded.

THE COURT: Well, I am not sure that in personam jurisdiction over a non-party is conceded. Obviously, they conceded jurisdiction over themselves. I am simply asking the question.

I understand that I can determine certainly in some instances whether these parties have an interest in the property.

The fraud allegations that you have brought, of course, part of them deal with Bonnie. And my – What I am telling you, I am not – I may be saying something that you agree with then; and that is, Bonnie certainly is not bound –

MR. HINKLE: I agree.

THE COURT: – as a non-party.

MR. HINKLE: That is true.

THE COURT: I questioned what would be essentially voiding a deed between the two estates, since Bonnie is a non-party; and the only transaction was between Roy's estate and Bonnie's estate with the possible exception of the possible conspiracy that you have mentioned. That is what I am asking the question about.

MR. HINKLE: First of all, what I am looking first at is the deed to Karen and Lontie, to their interest in the May 19 deed.

THE COURT: I understand which deed that is. I am not having much of a problem with that deed.

I keep referring to the deed transferring the property from Roy's Trust to Bonnie's Trust, which is also one of your allegations, and some of the evidence here. That is what I am addressing.

I am not saying anything – I haven't said anything about the deed to the children.

What I am saying is as to that other deed I don't – without her being a participant, I don't know unless what I said – unless she was a participant, other than your concept of some conspiracy and the act of one might bind the others, I am not sure how you enter a civil judgment as to that basis necessarily on that particular deed. I other words, you might be able to go back from the kids to Bonnie's Trust, which for the divorce purposes is really all you need anyway.

But for me to go to Roy's Trust to Bonnie, I would think Bonnie would have to be a party, would she not?

Well, even though they have admitted you have jurisdiction over them, I don't think they admitted you had jurisdiction over Bonnie in the Pretrial Order.

MR. GRAVES: Your Honor, since we don't seek to bind Bonnie or to obtain an order of this court that has the effect of res judicata with respect to her on an in personam basis, I don't think that that precludes this Court in carrying out the task of determining whether or not these debtors have a valid interest or a legally enforceable interest in this land, considering not only the validity of the May 19 deed but also the one that is necessary to support it; and that is its predecessor on May 10 and May 13.

I don't think it is necessary for Bonnie to be the subject of in personam jurisdiction of this Court for this Court to be able to address the merits of that transaction for

purposes of determining the interests of the debtors. I think there is a difference between the Court's capacity and authority and legal competency to bind someone on an in personam basis res judicata, which certainly is is question since she is not a party, on the one hand; and on the other, the Court considering the merits of those transactions which these debtors-in-possession must necessarily base their title or defend our challenges against their title. Thank you.

THE COURT: Do you have any comments, Mr. Forbes?

MR. FORBES: Well, scattered I am afraid. First of all, jurisdiction of the Court is not something that really can be waived by the parties. I don't think that – as to whether the Court has jurisdiction or not, the Court can raise jurisdiction at any point in time in any case is my understanding of the law.

I am not sure I completely understand what they are saying. Apparently they are saying they are not attempting to bind Bonnie's interest at all.

I assume by that Bonnie's interest, whatever she may have had, would have passed by both deeds; and no one is challenging that. We are only – (Interrupted)

MR. HINKLE: No. No. That is not right.

MR. FORBES: Well –

THE COURT: All I am saying is, I am not sure that I can give you the relief you actually sought, which is a return of property to Roy Clemence, which is what your brief indicated.

MR. HINKLE: What we are asking is for a determination of whether these debtors have any interest in that land – That is all we are asking this Court to do – and to making a binding decision with respect to these debtors.

I think we need to be very, very careful that everybody knows. We have invested a terrific amount of time and money, and I don't want us to do something precipitously that is only going to mean we are going to have to come back

and have to do the whole think all over again, particularly when we were assured that we were proceeding in the right avenue and that we all had concerns about our procedure. And the procedures have been more or less a morass in this since the outset, and we have proceeded in good faith that this Court could make that determination.

THE COURT: I didn't tell you that there isn't a determination that I can make pertaining to the property here. I don't believe I have ever represented to you that I didn't feel that I had jurisdiction to make such a determination.

".... I don't know that I ever told you that you didn't have to serve the parties in order to have them personally represented. I don't think that I said that. I certainly would never recall telling anyone that you don't have a have a party-defendant named and served.

As to any representation I made concerning the ability of this Court to determine whether these people had colorable – at least had colorable title to the property that I had jurisdiction of, and ancillary to that, a determination over other people who may be claiming an interest or could obtain jurisdiction over those people, I don't believe at anytime I would have ever told that your pleadings are all fine, that you have done everything necessary. I don't think that is my duty to tell you that, and I doubt that I would have made such a representation.

And I do think that I would have made a representation that I, as well as the state court, could hear the entire case.

I can read the record on June 29 or whatever it is. But I would be surprised if I assured you that had obtained all of the proper parties, because I doubt that I would bring it up on my own until such time as I though it was appropriate.

I am not saying that I can't decide any of these issues. I am simply saying I question a certain ability of mine to bind someone who is not here. And I really question –

although you may not – my ability to say anything about the initial deed that got it into Bonnie's Trust. And I don't think that should really bother you that much.

If I get it out of this estate, it then becomes some other court's problem as to whose property it is.

MR. HINKLE: Well, that is really all we are asking the Court to do. Of course, we understand –

THE COURT: I just simply want to bring to your attention that I don't believe that Bonnie is a party and that nothing here is going to have any effect and it may muddy up the water a little bit as to what my ability to do to certain of the transactions might be. I am not saying I am doing anything.

But the motion was made, and I have to consider what I might do. Okay.

Well, in any event, there is some evidence that has been presented; and I think it is not that you have to – I think that the evidence viewed in the light most favorable to the non-moving party here is what I consider. And I think certainly sufficient evidence has been presented on some issues that, that you would be required to present evidence to rebut it.

I believe that, that – Well, what you have said is that the evidence has to be clear and convincing. I am sure that is the criterion. But I am not sure that it is a criterion at this time. It is the criterion for me in any ultimate decision to determine whether or not the evidence is clear and convincing.

On the motion for directed verdict, I think under no circumstances would I probably be able to find for more than the criterion, is there any evidence to support their case.

MR. FORBES: Just so my position is clear, my thought is that at the close of the plaintiff's case, their evidence must be clear and convincing if their issue was fraud. Otherwise, we are entitled to what I would believe we have been entitled to, involuntary dismissal.

Certainly once the case is completed, the Court can consider all of the evidence, whether presented by the plaintiff or the defendant.

But at the close of the plaintiff's case, if it doesn't meet the burden, then I think we are entitled to judgment.

THE COURT: Well, I obviously – My time basically was spent thinking about whether Bonnie Clemence was a party-defendant. I wasn't sure whether she was. I knew she was in the National Bank of America's case and had been served.

I spent some time searching through the rest of the files to determine whether she had been served and simply not appeared. And obviously, that was a fruitless search, because I didn't find anything.

What I will do is essentially reserve my ruling. I will review all of this evidence, at least my notes as to it, and I will reserve ruling upon your motion to protect your interest until such time as I have reviewed it. And I will allow you to present your evidence or Mr. Somers to present his apparently.

MR. GRAVES: Would the Court welcome any efforts on our part to support memoranda on the question of whether or not Bonnie is an indispensable party for purposes of this Court's ability to review the validity of the deed between the trusts for purposes of determining whether or not these debtors have any interest in this land?

THE COURT: Which deeds are you talking about?

MR. GRAVES: Well, any of them that might be in question and to which Bonnie was a party.

I am not trying to – I am trying to frame the issue, I guess, in terms of the question of whether or not she is an indispensable party for purposes of doing what we are trying to do here. I don't think that she is.

I perceive it is a question that is concerning you. And since it is, if that is the issue, I would be happy to work on it a little.

THE COURT: Well, you are not going to work on it tonight.

MR. GRAVES: No.

THE COURT: So why don't we get whatever evidence we need to get in, and then I will tell you whether I need some assistance.

MR. GRAVES: Okay.

CERTIFICATE

COUNTY OF SHAWNEE)
) vs.
STATE OF KANSAS)

I, Reta L. French, a Certified Shorthand Reporter of Kansas and the official reporter for the United States Bankruptcy Court, certify that I reported in machine shorthand the proceedings had in the United States Bankruptcy Court for the District of Kansas, before the Honorable James A. Pusateri, U. S. Bankruptcy Judge, at Topeka, Kansas, on the 7th, 8th, 9th, 10th, 14th, and 23rd days of November, 1983, and on the 3rd day of January, 1984, in the before-captioned matter, in Bankruptcy Case No. 83-40307, Karen Kay Clemence, and Bankruptcy Case No. 83-40308, Lontie Joe Clemence.

I further certify that the foregoing transcript of my shorthand notes is a true copy of said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Topeka, Kansas, this 6th day of February, 1984.

SIGNED_____
RETA L. FRENCH
Court Reporter

NOTARY SEAL STATE
OF KANSAS

IN THE DISTRICT COURT OF DICKINSON

COUNTY, KANSAS

(FILED 6-20-84, 2:10 PM)

ROY ARTHUR CLEMENCE,)
)
Plaintiff,)
)
vs.)
)
)
BONNIE J. CLEMENCE,)
)
Defendant.)

Case No. 82 D 63

DECREE OF DIVORCE

Now, on this 19th day of June, 1984, the above-styled-cause come regularly on for trial of the issues in controversy between the Plaintiff, Roy Arthur Clemence, and the Defendant, Bonnie J. Clemence, said Plaintiff and Defendant being hereinafter referred to collectively as the "parties" and individually as the "Plaintiff" and the "Defendant". The Plaintiff appears personally and by his attorney, Max M. Hinkle of Lehman, Guilfoyle & Hinkle of Abilene, Kansas, but the Defendant appears not, neither in person nor by an attorney.

WHEREUPON, Plaintiff announces that he is ready to proceed to trial, and the Court, finding that this matter was set for trial on this date ninety (90) days ago and at a time

when the Defendant was represented by legal counsel and that this setting was agreed to by Defendant's counsel prior to his withdrawing from the case, and that the Defendant has made no request for a postponement of the same, further finds that the trial should proceed as ordered in the absence of the Defendant.

WHEREUPON, Plaintiff presents his evidence and rests, and no evidence is presented on behalf of the Defendant; and the Court, having heard the evidence and being advised in the premises, finds as follows:

I. That the Court has jurisdiction in personam over both the Plaintiff and the Defendant and has jurisdiction of the subject matter hereof and that proper venue lies with this Court.

II. That the Plaintiff was a bona fide resident of the state of Kansas for more than the sixty (60) days next preceding the filing of his petition for divorce herein; that the parties were united in marriage on the 21st day of May, 1954, at Abilene in Dickinson County, Kansas and have been at all times since that time and now are husband and wife.

III. That there are no minor children of this marriage.

IV. That differences have arisen between the parties of such a nature and to such an extent that it is impossible for them to live together harmoniously as husband and wife, and that a decree of divorce on the grounds of incompatibility should be granted to the Plaintiff from the Defendant.

V. That neither party should have judgment against the other for alimony.

VI. That the property of the parties should be divided between them in the manner as follows:

A. The Plaintiff should have as his sole and separate property, free and clear of all claims of the Defendant, the following:

1. All that real estate listed and enumerated on Exhibit A annexed hereto, subject, however, to the final determination yet to be made by the United States Bank-

ruptcy Court for the District of Kansas concerning the validity of a certain deed executed on the 19th day of May, 1982, by the parties as Trustees of the Bonnie J. Clemence Trust purporting to convey to Karen K. Clemence and Lontie J. Clemence certain tracts of land situated in Dickinson County and Ottawa County, Kansas, which are listed among those shown on the aforesaid Exhibit A. Should the aforesaid deed be finally determined to be invalid it is the finding of this Court that the ownership of all lands described therein as well as the other lands described in the aforesaid Exhibit A should be set over to the Plaintiff as his sole and separate property, free and clear of all claims of the Defendant. Should said deed be finally determined to be valid then this finding shall have no bearing on the lands described therein.

2. All interest of the parties in and to a certain contract for the sale of real estate entered into by and between Plaintiff and Defendant as Sellers and Samuel W. Kincaid and Georgia L. Kincaid as Buyers, said contract being dated the 4th day of April, 1979, and escrowed at the Assaria State Bank, Assaria, Kansas.

3. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Robert F. Patton and Ida Mae Patton as Sellers, said contract being dated the 4th day of February, 1976, and escrowed at the Solomon State Bank, Solomon, Kansas.

4. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Otis Rollins Clemence and Beulah Clemence as Sellers, said contract being dated the 11th day of January, 1974, and escrowed at the Citizens Bank and Trust Co., Bailene, Kansas.

5. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and

between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

6. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and the Addendum to said Contract being dated the 20th day of July, 1978, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

7. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

8. All farm and livestock tools, equipment and supplies heretofore belonging to either or both of the parties.

9. All farm machinery belonging to either or both of the parties, including but not limited to the following:

a) One (1) Waldon dual drill hitch;

b) One (1) Farmhand tub grinder;

c) One (1) 8' Speed mover;

d) One (1) John Deere 158 loader;

e) Two (2) pickup beds;

f) Two (2) truck feed boxes.

10. All motor vehicles belonging to either or both of the parties, except two (2) Cadillac sedans, including but not limited to the following:

a) One (1) 1980 Chevrolet 1/2 Ton Four Wheel drive pickup;

b) One (1) 1975 GMC 1/2 Ton pickup truck;

c) One (1) 1969 Chevrolet two ton truck (wrecked)

d) One (1) 1966 Chevrolet two ton truck (motor out);

e) One (1) 1965 Ford two ton truck;

f) One (1) 1957 Chevrolet two ton truck (registered);

g) One (1) 1957 Chevrolet two ton truck (unregistered);

h) One (1) 1974 Chevrolet half ton four-wheel drive;

i) One (1) 1973 Chevrolet 3/4 ton truck (shop truck);

j) One (1) 1974 Chevrolet 1/2 ton pickup truck (inoperable)

k) One (1) 1965 Chevrolet truck (tractor truck);

l) One (1) 1965 El Camino;

m) One (1) 1965 El Camino;

n) One (1) 1950 Chevrole one ton truck.

11. Life insurance policies issued on the life of the Plaintiff, as follows:

a) Victory Life Insurance policy no. 586603;

b) Manhattan Life Insurance policy no. 756034;

c) New York Life Insurance policy no. 36,001,732;

d) New York Life Insurance policy no. 27,043,163;

e) New York Life Insurance policy no. 27,018,894;

f) New York Life Insurance policy no. 27,018,895.

12. All grain, hay and silage now in storage belonging to either or both of the parties, including but not limited to the following:

a) 799.92 bushels of 1977 wheat in the Abilene Coop. Assoc., Abilene, Kansas;

b) 679.00 bushels of 1979 wheat in the Abilene Coop. Assoc., Abilene, Kansas;

c) 156 bushels of wheat in the Lincoln Coop, Lincoln, Kansas

13. All shares of stock now owned by the parties or either of them in the following farm cooperatives:

a) The Farmers Coop. Assoc., Talmage, Kansas;

b) The Solomon Coop. Assoc., Solomon, Kansas;

c) The Abilene Coop. Assoc., Abilene, Kansas.

14. All reserved patronage dividends now held for the account of theparties or either of them by the following farm cooperatives:

a) The Farmers Coop. Assoc., Talmage, Kansas;

b) The Solomon Coop. Assoc., Solomon, Kansas;

c) The Abilene Coop. Assoc., Abilene, Kansas.

15. All shares of stock now issued by the Federal Land Bank of Wichita, Kansas, to the parties or either of them.

16. Two (2) quarter horses.

17. All those proceeds now held by the Clerk of this Court deriving from the sale or sales of cattle pursuant to previous orders made herein, said proceeds together with interest accruing thereon to be paid to the Plaintiff forthwith.

18. That certain promissory note in the principal sum of $28,000.00 issued by Lontie J. Clemence to the parties on or about the 16th day of October, 1979, and the first real estate mortgage securing the same, said mortgage being dated the 16th day of October, 1979, and recorded on December 28, 1979, in Mortgage Book 168, Page 517 in the office of the Dickinson County Register of Deeds.

19. All that ornamental iron presently stored at the main house at Sand Springs.

20. All interest of the parties or either of them in those proceeds from the 1983 wheat crop impounded and now held by the Clerk of the United States Bankruptcy Court together with all interest accruing thereon.

21. All of the interest of the parties or either of them in government payments under 1983 farm programs including all grain entitlements under 1983 PIR contracts pertaining to any of the lands described above.

22. All of the interest of the parties or either of them in 1984 crops now growing or heretofore harvested from any of the lands described above.

23. All of the interest of the parties or either of them in pasture rentals accrued or accruing under 1983 and current leases of any of the real estate listed above.

24. All claims against Lontie J. Clemence and Karen K. Clemence for reimbursement for crops harvested in 1983 and 1984 and government program payments made in connection therewith and for pasture rentals for 1983 and 1984, all with respect to any of the real estate described in Exhibit A annexed hereto.

25. All counterclaims and crossclaims filed by the parties or either of them in this Court in Case No. 80 C 205, Ralph M. Stoneberger and Debra Stoneberger vs. Roy A. Clemence and Bonnie J. Clemence, et al.

26. All capital credits held for the account of either or both of the parties by D.S. & O. Rural Electric, Solomon, Kansas.

27. Plaintiff's checking account in the Citizens Bank and Trust Co, Abilene, Kansas.

B. The Defendant should have as her sole and separate property, free and clear of all claims of the Plaintiff, the following:

1. All household goods and antiques belonging to the parties or either of them, but not including the ornamental iron above awarded to the Plaintiff.

2. All cash presently in her possession.

3. Cemetery lots in Salina, Kansas.

4. Two (2) Arabian horses.

5. The real estate situated in Saline County, Kansas, described as follows:

a) Lot Three (3), Elm Grove Addition, Salina, Kansas;

b) The South Six Feet (6') of Lot Five (5), Block Seventeen (17), South Park Addition, Salina, Kansas;

c) A triangular tract adjacent to and North of Lots three (3), Four (4) and Five (5), Block Eleven (11), Chicago Addition plus the adjacent vacated Grand Blvd., Salina, Kansas.

6. One (1) 1979 Cadillac.

7. One (1) 1976 Cadillac.

VII. Each party should assume and pay all indebtedness contracted or incurred by him on or after June 10, 1982, and neither party should have judgment against the other with respect to any such indebtedness.

VIII. The costs hereof should be assessed to the Plaintiff.

IT IS THEREFORE, BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED as follows:

IX. That the Plaintiff, Roy Arthur Clemence, be and he is hereby granted a Decree of Divorce from the Defendant, Bonnie J. Clemence, on the grounds of incompatibility and the marital bonds heretofore established between the Plaintiff and the Defendant are hereby permanently and absolutely dissolved.

X. That the property of the parties is hereby divided between them in the manner following:

A. The Plaintiff shall have as his sole and separate property, free and clear of all claims of the Defendant, the following:

1. All that real estate listed and enumerated on Exhibit A annexed hereto, subject, however, to the final determination yet to be made by the United States Bankruptcy Court for the District of Kansas concerning the validity of a certain deed executed on the 19th day of May, 1982, by the parties as Trustees of the Bonnie J. Clemence Trust purporting to convey to Karen K. Clemence and Lontie J. Clemence certain tracts of land situated in Dickinson County and Ottawa County, Kansas, which are listed among those shown on the aforesaid Exhibit A. Should the

aforesaid deed be finally determined to be invalid it is the finding of this Court that the ownership of all lands described therein as well as the other lands described in the aforesaid Exhibit A should be set over to the Plaintiff as his sole and separate property, free and clear of all claims of the Defendant. Should said deed be finally determined to be valid then this finding shall have no bearing on the lands described therein.

2. All interest of the parties in and to a certain contract for the sale of real estate entered into by and between Plaintiff and Defendant as Sellers and Samuel W. Kincaid and Georgia L. Kincaid as Buyers, said contract being dated the 4th day of April, 1979, and escrowed at the Assaria State Bank, Assaria, Kansas.

3. All interest of the parties in and to a certain contract for the purchase of real estate entered into by an between the Plaintiff and Defendant as Buyers and Robert F. Patton and Ida Mae Patton as Sellers, said contract being dated the 4th day of February, 1976, and escrowed at the Solomon State Bank, Solomon, Kansas.

4. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Otis Rollins Clemence and Beulah Clemence as Sellers, said contract being dated the 11th day of January, 1974, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

5. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

6. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and the Addendum to said contract being dated the 20th day of July, 1978, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

7. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

8. All farm and livestock tools, equipment and supplies heretofore belonging to either or both of the parties.

9. All farm machinery belonging to either or both of the parties, including but not limited to the following;

a) One (1) Waldon dual drill hitch;

b) One (1) Farmhand tub grinder;

c) One (1) 8' Speed mover;

d) One (1) John Deere 158 loader;

e) Two (2) pickup beds;

f) Two (2) truck feed boxes.

10. All motor vehicles belonging to either or both of the parties, except two (2) Cadillac sedans, including but not limited to the following:

a) One (1) 1980 Chevrolet 1/2 Ton Four Wheel drive pickup;

b) One (1) 1975 GMC 1/2 ton pickup truck;

c) One (1) 1969 Chevrolet two ton truck (wrecked);

d) One (1) 1966 Chevrolet two ton truck (motor out);

e) One (1) 1965 Ford two ton truck;

f) One (1) 1957 Chevrolet two ton truck (registered);

g) One (1) 1957 Chevrolet two ton truck (unregistered);

h) One (1) 1974 Chevrolet half ton four-wheel drive;

i) One (1) 1973 Chevrolet 3/4 ton truck (shop truck);

j) One (1) 1974 Chevrolet 1/2 ton pickup truck (inoperable);

k) One (1) 1965 Chevrolet truck (tractor truck);

l) One (1) 1965 El Camino;

m) One (1) 1965 El Camino;

n) One (1) 1950 Chevrolet oneton truck.

11. Life insurance policies issued on the life of the Plaintiff, as follows:

a) Victory Life Insurance policy no. 586603;

b) Manhattan Life Insurance policy no. 756034;

c) New York Life Insurance policy no. 36,001,732;

d) New York Life Insurance policy no. 27,043,163;

e) New York Life Insurance policy no. 27,018,894;

f) New York Life Insurance policy no. 27,018,895.

12. All grain, hay and silage now in storage belonging to either or both of the parties, including but not limited to the following:

a) 799.92 bushels of 1977 wheat in the Abilene, Coop. Assoc., Abilene, Kansas;

b) 679.00 bushels of 1979 wheat in the Abilene Coop. Assoc., Abilene, Kansas;

c) 156 bushels of wheat in the Lincoln Coop, Lincoln, Kansas.

13. All shares of stock now owned by the parties or

either of them in the following farm cooperatives:

a) The Farmers Coop. Assoc., Talmage, Kansas;

b) The Solomon Coop. Assoc., Solomon, Kansas;

c) The Abilene Coop. Assoc., Abilene, Kansas.

14. All reserved patronage dividends now held for the account of the parties or either of them by the following farm cooperatives:

a) The Farmers Coop. Assoc., Talmage, Kansas;

b) The Solomon Coop. Assoc., Solomon, Kansas;

c) The Abilene Coop. Assoc., Abilene, Kansas.

15. All shares of stock now issued by the Federal Land Bank of Wichita, Kansas, to the parties or either of them.

16. Two (2) quarter horses.

17. All those proceeds now held by the Clerk of this Court deriving from the sale or sales of cattle pursuant to previous orders made herein, said proceeds together with interest accruing thereon to be paid to the Plaintiff forthwith.

18. That certain promissory note in the principal sum of $28,000.00 issued by Lontie J. Clemence to the parties on

or about the 16th day of October, 1979, and the first real estate mortgage securing the same, said mortgage being dated the 16th day of October 1979, and recorded on December 28, 1979, in Mortgage Book 168, Page 517 in the office of the Dickinson County Register of Deeds.

19. All that ornamental iron presently stored at the main house at Sand Springs.

20. All interest of the parties or either of them in those proceeds from the 1983 wheat crop impounded and now held by the Clerk of the United States Bankruptcy Court together with all interest accruing thereon.

21. All of the interest of the parties or either of them in government payments under the 1983 farm programs including all grain entitlements under 1983 PIK contracts pertaining to any of the lands described above.

22. All of the interest of the parties or either of them in 1984 crops now growing or heretofore harvested from any of the lands described above.

23. All of the interest of the parties or either of them in pasture rentals accrued or accruing under 1983 and current leases of any of the real estate listed above.

24. All claims against Lontie J. Clemence and Karen K. Clemence for reimbursement for crops harvested in 1983 and 1984 and government program payments made in connection therewith and for pasture rentals for 1983 and 1984, all with respect to any of the real estate described in Exhibit A annexed hereto.

25. All counterclaims and crossclaims filed by the parties or either of them in this Court in Case No. 80 C 205, Ralph M. Stoneberger and Debra Stoneberger vs. Roy A. Clemence and Bonnie J. Clemence, et al.

26. All capital credits held for the account of either or both of the parties by D.S.&O. Rural Electric, Solomon, Kansas.

27. Plaintiff's checking account in the Citizens Bank and Trust Co, Abilene, Kansas.

B. The Defendant shall have as her sole and separate property, free and clear of all claims of the Plaintiff, the following:

1. All household goods and antiques belonging to the parties or either of them, but not including the ornamental iron above awarded to the Plaintiff.

2. All cash presently in her possession.
3. Cemetery lots in Salina, Kansas.
4. Two (2) Arabian horses.
5. The real estate situated in Saline County, Kansas, described as follows:

a) Lot Three (3), Elm Grove Addition, Salina, Kansas;

b) The South Six Feet (6') of Lot Five (5), Block Seventeen (17), South Park Addition, Salina, Kansas;

c) A triangular tract adjacent to and North of Lots Three (3), Four (4) and Five (5), Block Eleven (11), Chicago Addition plus the adjacent vacated Grand Blvd., Salina, Kansas.

6. One (1) 1979 Cadillac.

7. One (1) 1976 Cadillac.

XI. Each party shall assume and pay all indebtedness contracted or incurred by him or her on or after June 10, 1982, and neither party shall have judgment against the other with respect to any such indebtedness.

XII. The costs hereof are assessed to the Plaintiff.

XIII. That the parties shall execute, deliver and exchange wherever the same may be necessary to effectuate the judgments issued herein deeds, receipts, bills of sale, and any and all other necessary and incidental documents. In the event of the failure or refusal of either of the parties to so execute and deliver such instruments as may be necessary to effectuate the judgements issued herein, then and in that event the judgments made herein shall stand in lieu of such instruments.

S/_____
District Judge, Div. I

SUBMITTED BY:

LEHMAN, GUILFOYLE & HINKLE

By S/Max M. Hinkle
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In re:

KAREN KAY CLEMENCE No. 83-40307
LONTIE JOE CLEMENCE No. 83-40308

Debtors,

CITIZENS BANK AND TRUST COMPANY OF ABILENE,

Plaintiff,

vs. Adversary Proceeding

KAREN KAY CLEMENCE and No.83-0232
LONTIE JOE CLEMENCE, No.83-0233

Defendants.

ROY ARTHUR CLEMENCE,

Plaintiff,

vs. Adversary Proceeding

KAREN KAY CLEMENCE and No.83-0291
LONTIE JOE CLEMENCE, No.83-0292

Defendants.

ORDER

This case is before the court for a review of findings made by Bankruptcy Judge Pusateri in a memorandum of decision lodged February 24, 1984 pursuant to Rule 42 of the Local Rules of Practice. This Rule provides:

In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject or modify, in whole or in part, the order or judgement of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

This court has carefully reviewed the lengthy transcript of the hearing which was the basis of Judge Pusateri's decision. In addition, the court has reviewed memoranda submitted by the interested parties and "additional evidence" submitted by the debtors. On the basis of this study, the court makes the following findings:

1. This court has jurisdiction over this matter under 28 U.S.C. Section 1334 and 1471 (a) (b) & (e).

2. This matter was properly referred for decision by Bankruptcy Judge Pusateri under Local Rule 42.

3. Local Rule 42 is not unconstitutional and empowers this court to grant authority to Bankruptcy Judge Pusateri to hear this case. Oklahoma Health Services Federal Credit Union v. Webb, 726 F.2d 624 (10th Cir. 1984); White Motor Corp. v. Citibank, 704 F.2d 254 (6th Cir. 1983).

4. Roy Clemence is a proper party with an interest in the property claimed by the debtors by reason of his petition for separate maintenance. Cady v. Cady, 224 Kan. 339, 581 P.2d 358 (1978).

5. No error was committed by proceeding in the absence of Bonnie Clemence as a party for the following reasons:

a) The findings of this court do not injure any interest asserted by Bonnie Clemence;

b) Bonnie Clemence had an opportunity to assert an interest as an intervening party but did not elect to do so;

c) Any interest of Bonnie Clemence in sustaining her conveyance to the debtors was fully represented by the debtors in this action;

d) The parties in this suit are not subject to double, multiple, or inconsistent obligations by reason of any interest claimed by Bonnie Clemence; and

e) There is no other reason in equity or good conscience for the joinder of Bonnie Clemence as a party.

6. Aside from the factual findings that Lynn Hoover did not know of the May 19, 1982 deed prior to December 1982, the court shall adopt the findings of fact and conclusions of law contained in the memorandum of decision lodged by Judge Pusateri. The court finds that Hoover knew of the deed prior to December 1982. This finding, however, does not alter the court's decision to accept the other findings and conclusions submitted by Judge Pusateri.

7. The court has considered the "new evidence" submitted on behalf of the debtors, most, if not all, of which could have been presented during the hearing before Judge Pusateri. This evidence has not persuaded the court to decline to accept the findings of Judge Pusateri, to hold further hearings on this matter, or to completely retry the issues involved.

8. Debtors have had sufficient time to present evidence and arguments in this matter. The court is convinced that an extension of time would serve no useful purpose. Consequently, debtors' motion for enlargement of time filed April 27, 1984 is denied.

In conclusion, the court has reviewed the memorandum of decision of Judge Pusateri lodged on February 24, 1984 in accordance with Local Rule 42(e) (2) (B) and approves and adopts the findings of fact and conclusions of law contained therein consistent with the previous statements in this order.

IT IS SO ORDERED.

Dated this 16th day of July, 1984, at Topeka, Kansas.

S/Richard D. Rogers
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	)	
	)	
KAREN KAY CLEMENCE	)	No. 83-40307
LONTIE JOE CLEMENCE	)	No. 83-40308
	)	
Debtors.	)	
	)	
CITIZENS BANK AND TRUST	)	
COMPANY	)	Adversary
OF ABILENE,	)	Proceeding
Plaintiff,	)	
	)	
vs.	)	
	)	
KAREN KAY CLEMENCE and	)	No. 83-0232
LONTIE JOE CLEMENCE,	)	No. 83-0233
	)	
Defendants.	)	
	)	
ROY ARTHUR CLEMENCE,	)	Adversary
Plaintiff,	)	Proceeding
	)	
vs.	)	
	)	
KAREN KAY CLEMENCE and	)	No. 83-0291
LONTIE JOE CLEMENCE,	)	No. 83-0292
Defendants.	)	

MEMORANDUM OF DECISION

In this chapter 11 proceeding, the Court must determine whether the debtors own some 5,000 acres of real estate purportedly acquired by gift from their mother and father, and now challenged by their father and creditors.

The debtors are represented by Randall W. Forbes of Crane, Martin, Claussen, Hamilton & Forbes, Topeka, Kansas, and Peter V. Smilde of Smilde & Elkins, Dallas, Texas.

The creditor Citizens Bank and Trust Co. of Abilene is represented by Dale L. Somers of Eidson, Lewis, Porter & Haynes, Topeka, Kansas. Roy Clemence, father of the debtors, is represented by Charles R. Hay of Goodell, Stratton, Edmonds, Palmer & Wright, Topeka, Kansas, and Max M. Hinkle of Lehman, Guilfoyle, & Hinkle, Abilene, Kansas. The creditor National Bank of America at Salina is represented by James T. Graves of Clark, Mize & Linville, Salina, Kansas.

Bonnie Jean Clemence, the debtors' mother and alleged transferor/donor, was not a party to this action and though she appeared as a witness, she was not represented.

The Court must decide the following issue:

Was the transfer of May 19, 1982 from the Bonnie Clemence Trust to Lontie and Karen Clemence of virtually all the Clemence real estate a valid transfer.

Do the debtors, Lontie and Karen Clemence, own the real estate in question.

FINDINGS OF FACT

Tolstoi wrote: "Happy families are all alike; every unhappy family is unhappy in its own way." (Anna Karenina, Pt. 1, ch. 1). Multiple chapter 11 proceedings, criminal accusations, a divorce proceeding and a bitter struggle over substantial land holdings and prospective inheritance is the unhappy way of this unhappy family.

Throughout this opinion, the Court refers to the members of the Clemence family by their first names. This is done neither out of disrespect nor familiarity. The members of the family were addressed and referred to by their first names at trial, and for purposes of continuity and clarity, the practice is continued in this opinion.

Roy C. Clemence is 76 years old. He has an eighth grade education. He first married when he was 28 years old to Zella Smith and 2 sons were born to the marriage: Roy Douglas Clemence (Doug) and Charles Roy Clemence (Chuck).

In 1953, Zella died. Roy had been acquainted with the Wilson family for several years. In 1954, Roy, at the age of 47, married one of the Wilson children, Bonnie Jean, who was then 26. When Roy married Bonnie, he owned one section of grassland in Dickinson County, Kansas, 5 pieces of river bottom ground and an interest in 880 acres in Geary County. The Wilson family apparently owned significant amounts of property. Though Bonnie did not immediately bring much of this property to the marriage, sometime later she received through inheritance her proportionate share of the family property.

Roy and Bonnie were married in May, 1954, and they entered into a written agreement in September, 1954 (defendant's exh. C). In the agreement, it is recited that Bonnie consented to Roy's will in which she would receive less than one-half of his property. Roy agreed to waive his interest in any inheritance to be received by Bonnie and in certain property owned by Bonnie at the time. Roy and Bonnie had two children: Karen Kay Clemence and Lontie Joe Clemence. After their births, the substance of the 1954 agreement was repeated in subsequent wills. In 1968, both Roy and Bonnie executed wills and consented to each other's will. Bonnie's will (defendant's exh. F) provided that her property would pass to Roy for his life, with the remainder to Lontie and Karen. Roy's provided for a bequest of $40,000

to Doug, subject to an advancement and ademption made in 1965, and subject to payment of obligations guaranteed by Roy. Roy's will also provided for a bequest of land to Chuck, subject to similar limitations. The remainder of Roy's property was to go to Bonnie and Karen and Lontie.

In 1978, trust agreements and new wills were executed by Bonnie and Roy (defendant's exhs, K, L, M and N. These agreements also provided for relatively small transfers to Doug and Chuck, and the bulk of the estate passing to Lontie and Karen.

There were allegations at the trial that Bonnie had defrauded Roy since 1954. There were allegations at the trial that since 1954 Roy never intended to essentially cut Doug and Chuck out of any property acquired by Bonnie. The documents, however, indicate quite plainly that Roy and his children would have no claim to Bonnie's estate existing in 1954, and any inheritance from the Wilson family. The documents also indicate that both Roy and Bonnie intended the bulk of their estate to pass to only Lontie and Karen and not Doug and Chuck. Perhaps (in 1954) prior to the substantial growth in the couple's assets this seemed fair to Roy. Certainly by 1982 Roy did not believe it was fair for Karen and Lontie to receive the bulk of the Clemence farm. By 1982, Roy desired that one-half of all the land holdings go to Lontie and Karen, and one-half to Chuck and Doug. Bonnie rejected this proposal, desiring all the land to go to Lontie and Karen and, according to Roy, said "Wilson all the way."

After 1954, Bonnie and Roy operated their farm and in addition to giving birth to Lontie and Karen, they managed to dramatically increase their assets until, by 1982, the farm they operated was approximately 5,000 acres in size located in 4 counties in Kansas. This land, however, was not land that would pass to Chuck and Doug, but rather, according to the wills and trusts, was destined to eventually pass to Karen and Lontie.

A number of events occurred in 1982 that brought to a head the family conflicts.

In May, 1982 and after contacting Bonnie and Roy a number of times concerning collection of or obtaining security for a debt, the Citizens Bank & Trust Co. of Abilene (Citizens) filed suit against Bonnie and Roy to collect the obligation owed to Citizens. There was quite a bit of testimony concerning the history of the Clemence line of credit with Citizens, use of the funds by either Roy, Bonnie, Roy and Bonnie, or Chuck and Lontie in the course of a partnership called Clemence Brothers established to run the farm. In 1982 Citizens was interested in securing a mortgage on the 5,000 acre farm to secure the debt. Bonnie felt the Citizens obligation was Roy's and that her property destined to pass to Lontie and Karen should not be used to pay Roy's or the debts of the children of Roy's first marriage. The Court does not view it essential to attempt to resolve the many conflicting facts surrounding the Citizens loan. Suffice it to say the debt was due, Citizens could not obtain satisfaction, payment or security from any of the Clemence family, and it determined it necessary to take legal action.

In May, 1982 Citizens contacted Max Hinkle, an attorney in Abilene, to file suit against Bonnie and Roy. Before May, 1982 Mr. Hinkle had represented Roy and Bonnie. His work for them included preparation of real estate sale contracts and consent forms in conjunction with water rights applications. Other interested parties in this proceeding represented from time to time by Mr. Hinkle in matters directly relating to the Clemences included the Federal Land Bank for whom he did a title search in connection with the Clemence's attempt to secure a loan from the Land Bank. Mr. Hinkle also filed a criminal complaint as special prosecutor in Dickinson County at the behest of Chuck Clemence against Bonnie and Karen. (See, e.g., defendant's exh. GGG)

On May 18, 1982 Mr. Hinkle filed an action against Roy and Bonnie on behalf of Citizens. In the first count, Citizens sought judgement against only Roy in the amount of approximately $149,000. In the second count, Citizens sought judgement against both Roy and Bonnie based on insufficient funds checks. Roy was served personally on May 27, 1982 and Bonnie was served on the same day. Sometime between May 27, 1982 and June 10, 1982 Roy approached Mr. Hinkle to represent him. Mr. Hinkle made a full disclosure to and obtained the consent of Citizens (although the Court cannot fathom why Citizens would object). Mr. Hinkle made a full disclosure to and obtained the consent of Roy. Thus, in count 1 of the complaint against Roy, Mr.. Hinkle represented both the plaintiff and the defendant. Apparently, even though one of Mr. Hinkle's allegations in the instant bankruptcy court action on behalf of Roy Clemence (Mr. Hinkle represented Roy Clemence in this action) is that Roy had "diminished capacity" or at least was extremely maleable in the hands of people he trusted in May-June, 1982 due to his age, and Parkinson's disease, apparently Mr. Hinkle had no problem believing that Roy, although diminished in capacity, nonetheless maintained sufficient capacity to understand and competently determine that he wanted to be represented by the same attorney representing Citizens. The Court must candidly admit it has never understood Mr. Hinkle's theory of sliding-scale capacity and undue influence by persons in whom Roy placed trust. In any event, on June 10, 1982 Mr. Hinkle filed an answer for Roy in which Roy consented to judgement in favor of Citizens in the amount of $149,974.31, plus interest and costs. A journal entry was filed that same day reflecting the consent judgement. Also on June 10, a cross petition was filed by Mr. Hinkle for Roy against Bonnie alleging she was liable for 1/2 of all judgements awarded to Citizens.

Several events occurred in May just prior to the commencement of Citizens' May 18, action.

On May 10, 1982 a warranty deed was executed transferring the land eventually destined to be Chuck's (see defendant's exhs. G, L) from the Roy Clemence Trust to the Bonnie Clemence Trust. The document was executed by Roy and Bonnie as trustee's of the Roy Clemence Trust, and notarized by Loren Harris of the National Bank of America (NBA) in Salina, Kansas (defendant's exh. 0). This transfer (plaintiff's exh. l) was apparently made to comply with a May, 1982 request of the Federal Land Bank (defendant's exh. FF). The basis of the request was a requirement made after a title search by Mr. Hinkle for the FLB in relation to a pending loan application by Roy and Bonnie Clemence.

On May 19, 1982 an undivided 1/2 interest in certain Ottawa County property held in the Roy Clemence Trust was transferred to the Bonnie Clemence Trust. Again, the deed was executed by Roy and Bonnie in their trustee capacity (defendant's exh. R). On May 19, 1982 virtually all the Clemence real estate, now being held in the Bonnie Clemence Trust, was deeded in a General Warranty Deed to Lontie and Karen Clemence (defendant's exh. S). The descriptions of the land transfer are attached to exhibit S and are over 5 legal pages in length. This transfer was also executed by Bonnie and Roy in their capacity as trustees.

The sum and substance of these transfers were that in a matter of 9 days, virtually all of the Clemence property, 5,000 acres in four counties, held in either Roy's or Bonnie's trust was transferred, at least on paper, to Karen and Lontie Clemence for consideration of $1.00.

To further summarize, throughout April and May Citizens had been attempting to obtain security for their debt, preferably a mortgage on the Clemence land. Roy favored it. Bonnie opposed it. Citizens filed an action to collect the debt on May 18. Bonnie knew of the action on May 19 if Mr. Hinkle's testimony is believed. (In addition to the many parties represented by Mr. Hinkle, he was also called as a

witness by Karen and Lontie and provided what the Court views as key evidence. It is also interesting to note that in Bonnie's prior chapter 11 proceeding in this Court, Mr. Hinkle took the stand, as called by Dale Somers, an attorney for Citizens, to provide the only testimony offered in Citizens' motion to dismiss Bonnie's chapter 11.) Bonnie did not know of the action on May 19 if her testimony is believed, and the land was transferred to Karen and Lontie on May 19 for the consideration of $1.00.

The Court finds that on May 19 Bonnie either knew the suit was about to be filed due to Citizens' activities in April and May, or actually knew the suit had been filed, before service was obtained.

There was considerable evidence presented concerning the validity and propriety of the transfers between the Roy Clemence Trust and the Bonnie Clemence Trust. Roy denied understanding the trust of 1978, the advances and ademptions with Chuck and Doug, the wills of the 1960's and even the agreement of 1954. Roy presented testimony to show that he executed the May, 1982 documents as a result of diminished capacity and undue influence, as part of a fraudulent scheme by Bonnie, Karen and Lontie to remove him from the farm operation, and to see to it that Karen and Lontie, and not Chuck and Doug, received the land. Needless to say there is conflicting evidence on these points.

On June 10, 1982 (the same day Roy consented to judgement in favor of Citizens and cross petitioned against his wife for 1/2 of the amount of the judgement), Max Hinkle filed a separate maintenance action for Roy Clemence against Bonnie Clemence. This action was later amended to seek a divorce from Bonnie. Also on June 10, 1982 a restraining order was entered prohibiting Bonnie and Roy from transferring any property.

On July 29, 1982 Bonnie Clemence filed a chapter 11 petition in bankruptcy in this court. In her petition schedules, Bonnie listed the real estate located in Lincoln and Saline Counties as property owned by her. She listed the Dickinson and Ottawa Counties property as "Bonnie Clemence, Farm Land, Improvements . . . ." (see plaintiff's (Roy) exhs. 33, 43). She claimed 160 acres as exempt. In her schedules she stated that the only property she held for another person (question 8 in statement of financial affairs) was "Contingent. Bonnie Wilson Clemence Trust, October 20, 1978 as amended 5/19/82." The amendment to which she referred is reflected in plaintiff's (Roy) exhibit 6 and constituted the creation of what is known as a QTIP trust. The QTIP trust did not purport to affect a transfer of ownership of the real estate in question to Karen and Lontie on May 19, 1982 and the attorney who drafted the QTIP trust (Lynn C. Hoover) testified he was unaware of the May 19 land transfer to Karen and Lontie. Although not outside the total family estate plan as he understood it, Mr. Hoover stated the transfer was not made on his advice. In answer to question 14 of the statement of financial affairs, Bonnie stated she had not made any gifts to family members in the year preceding her bankruptcy petition, nor had she made any transfers other than granting a mortgage to the National Bank of America.

In the course of their parents' domestic relations action, Karen and Lontie were represented by Martin W. Bauer, an attorney from Wichita. In the instant action, the parties stipulated Mr. Bauer would testify he had no knowledge of the May 19 deed until after December 14, 1982 (plaintiff Roy's exh. 65).

On May 26, 1982 Bonnie granted Lontie the power of attorney to execute all Agricultural Stabilization County Supervisor (ASCS) forms (Roy's exh. 23). Roy's exhibit 27

indicates that in February, 1983 Bonnie contracted with Marvin and Marcia Freeman to sell them land on the authority of this Court in Bonnie's chapter 11 proceeding. Roy's exhibit 28 indicates a similar sale by Bonnie to Stewart International, Inc. in February, 1983. See also Roy's exhibit 53. Both tracts of real estate to be sold by Bonnie in 1983 were part of the May 19 deed purportedly transferring the land to Karen and Lontie (compare Roy's exh. 4). Exhibits 27 and 28 do not mention Karen, Lontie or their claimed interest in the land.

In the domestic relations case Roy propounded interrogatories to Bonnie which she answered in October, 1982. (Roy's exh. 39) Interrogatory 10 asked if Bonnie "sold or disposed" of real property within the last 12 months. She answered "Apart from some estate planning transfers," there were none. The interrogatory #10 also requested Bonnie to "specify in detail any item of property sold or disposed of by gift, sale or otherwise, [and] the person to whom said property was transferred . . . ." Bonnie's answer did not respond.

On Bonnie's monthly financial reports in her chapter 11 proceeding, she claimed the value of the real estate, almost $2.5 million, as her asset. (See, e.g., Roy's exhs. 47, 48, 49, 51, 52).

Not a single witness was produced at the instant trial who could testify that they knew or were informed of the May 19 deed until sometime in December, 1982. Neither John Koepke nor Donald Louden, Bonnie's bankruptcy attorneys, knew of the deed. Both testified they first heard of the deed in December, 1982. This testimony directly conflicts with the testimony of Bonnie and Karen who stated both attorneys were aware of the deed and were informed of the deed in June or July, 1982. Lynn C. Hoover, Bonnie's estate planning attorney, had no knowledge of the deed. Representatives of the creditors involved in this case testified they did not know of the deed, although Loren Harris of

NBA notarized the deed but asserted he did not read the document nor did he question what was being transferred. Federal Land Bank was unaware of the deed. Martin Bauer, Karen and Lontie's attorney in their parents' domestic relations action, had no knowledge of the deed prior to December of 1982.

Bonnie testified that Frank Norton, a Salina attorney who prepared a number of deeds for the Clemences, prepared the May 19 deed, but Mr. Norton testified neither he nor his office prepared the May 19 deed.

The deed was not filed of record by Karen and Lontie until April 25, 1983. This is curious because the May 10 deeds transferring realty from Roy's trust to Bonnie's trust were filed of record on May 19, 1982. The May 14, 1982 deed was also filed of record on May 19. Thus, the only May, 1982 deed that was not filed immediately was the May 19 deed. It is clear to the Court that the May 19 deed was not recorded because Bonnie, Karen and Lontie believed the transfer was not effective until the deed was recorded. No gift tax return was filed dealing with the May 19 5,000 acre gift to Karen and Lontie.

Upon questioning by the Court, Karen indicated the following people were told of the deed:

Orvil Teaman of Farmer's Home Administration,
Dave Smith of Salina Credit Association,
John Koepke, Bonnie's bankruptcy attorney,
Don Louden, Bonnie's bankruptcy attorney.

Upon questioning by the Court, Karen indicated the following people knew of the deed:

Loren Harris of NBA
Martin Bauer, her attorney
in the domestic relations action,
Bob Jones, an attorney
practicing with Frank Norton

Yet, when called upon, no one testified they knew of, were told of, or even suspected the existence of the deed of May 19, until December, 1982. In December, 1982 the existence of the deed was discovered, and this Court ordered the dismissal of Bonnie's chapter 11 caseon March 28, 1983.

On April 18, 1983 Karen and Lontie filed separate pro se chapter 11 petitions, claiming ownership of the land in question. They later employed counsel.

In addition to these facts the Court specifically finds as follows:

1. Before December, 1982, Karen, Lontie and Bonnie Clemence never communicated to anyone other than Roy Clemence that virtually all 5,000 acres of real estate had been transferred to Karen and Lontie. The Court does not address the issues surrounding Roy's knowledge, participation or mistake in the transfer nor the issue of undue influence by Bonnie over Roy. The Court simply finds, contrary to the assertions of Karen, Lontie and Bonnie, that the transfer was never communicated to the many people they assert were told.

2. Karen, Lontie and Bonnie did not believe the transfer was effective until such time as the deed was filed of record.

3. The transfer was intended by Bonnie to be completed sometime in the future for the primary purpose of insuring that descent of the realty to Karen and Lontie as outlined in the many agreements, wills and trusts executed

by Roy and Bonnie since 1954 was carried out, and for the secondary reason of protecting the property from satisfaction of debts she considered solely Roy's, e.g., Citizens.

4. The actual ownership of the land as between Roy and Bonnie is irrelevant to this Court's determination because of the pending domestic relations action and because Bonnie Clemence is not a party to this proceeding.

5. Without deciding, but assuming arguendo that Roy willingly, competently, with full knowledge, and without influence executed the deeds of May 10, 14 and 19, 1982, nevertheless, he, like Bonnie, did not intend the deed to Karen and Lontie to be effective until some time in the future.

6. As of June 10, 1982, neither Bonnie, Roy, Karen or Lontie intended that Karen and Lontie own the land on that date.

7. As of February, 1983 neither Bonnie, Roy, Karen or Lontie intended that Karen and Lontie own the land on that date.

8. The Court makes no findings with respect to undue influence exercised by Bonnie over Roy, fraud perpetrated by Bonnie on Roy during May, 1982, 1978, 1976, 1968 or since 1954. The Court makes no findings with respect to any participation of Karen and Lontie in any fraud or undue influence.

9. Throughout Bonnie's chapter 11 proceeding, Karen and Lontie attended hearings, were approved as employee's of Bonnie's farming operation, and never uttered a word concerning their purported ownership of the farm until December, 1982.

CONCLUSIONS OF LAW

When a transfer is made without consideration, such as the recited consideration of $1 in a real estate deed, there is an inference that a gift was intended. Hansen v. Walker, 175 Kan. 121, 123, 259 P. 2d 242 (1953). The elements of a valid gift are:

1. Intent by donor to make a voluntary, gratuitous, absolute transfer of property from the donor to the donee, effective immediately upon transfer and in which there is complete immediate surrender of control by the donor;

2. Delivery by the donor, and

3. Acceptance by the donee.

See, e.g., Truax v. Southwestern College, Oklahoma, 214 Kan. 873, 522 P.2d 412 (1974); In Re Brown's Estate, 159 Kan. 408, 155 P.2d 445 (1945); Lanphear v. McLean, 135 Kan. 266, 10 P.2d 889 (1932); Hall v. Hall, 76 Kan. 806, 93 P. 177 (1903); Bruce v. Squires, 68 Kan. 199, 74 P. 1102 (1904); Gallagher V. Doraky, 65 Kan. 341, 69 P 330 (1902). The party asserting a valid gift has the burden of proving the existence of all the elements of a gift. Traux v. Southwestern College, Oklahoma, 214 Kan., supra 878.

The donor's intent is determined by the acts, words and circumstances surrounding the transfer. Stevenson v. Hunter, 131 Kan. supra at 754. The Court holds there was no intent by Bonnie or Roy to make an absolute transfer of the real estate to Lontie and Karen, nor to effect a complete and immediate surrender of control of the property. Certainly from Roy's standpoint, there are questions

concerning fraud and undue influence which, if proved, would vitiate any intent he may have had to make an absolute transfer. See, e.g., Frame v. Bauman, 202 Kan. 461, 449 P.2d 525 (1969); Seward v. Seward, 59 Kan. 387, 53 P. 63 (1898). More importantly for this Court's decision, however is an examination of Bonnie's intent.

Based on Bonnie's belief that the deed was not effective until recorded; her treatment of the land as hers and only hers from and after May 19, 1982; the secretive nature of the transfer in which one was told of the transfer for 7 months; her statements in writing, in her bankruptcy proceeding and the domestic relations action, may under oath, that she alone owned the real estate, it's clear to the Court that Bonnie did not intend the transfer to be effective on May 19, 1982.

In addition, she never surrendered control. See, Lamphear v. McLean, 135 Kan. 266, 10 P.3d 889 (1932); Bruce v. Squires, 68 Kan. 199, 74P. 1102 (1904); 38 CJS Gifts Section 20 at 799 (1943). The transfer must be so complete:

> that if the donor again resumes control over the property, without the consent of the donee, [s]he will become liable as a trespasser.

38 Am. Jur.2d Gifts Section 18 (1968). At all times, up to 1983, Bonnie controlled the land, claimed to own the land, attempted to sell the land without the donees' written consent in the sale contract, and in fact intended to use the land to generate money to fund her chapter 11 plan. Furthermore, a delivery for safekeeping or for a purpose, express or implied, other than a specific intent to part with all right, title and interest in and all dominion over the property does not constitute a gift. Boling v. Gibson, 226 Ark. 310, 584 SW2d 14, 17 (1979), affirmed after remand, 622 SW2d 180. This "delivery" to Karen and Lontie was made without the

specific intent to part with all right, title and interest in, and dominion over the real estate. This transfer was made to put the property beyond the reach of Citizens because of the belief that the Citizens debt was a debt of Roy, Chuck and Doug, and should not be satisfied out of real estate destined to pass to Lontie and Karen only and to ensure that 28 years of intent as expressed by various wills and trusts be carried out.

Either Karen or Lontie or both appeared with their mother at hearings during her chapter 11 proceeding. Lontie and Karen were paid and listed as employees in their mother's chapter 11 proceeding (exh. 42, 5). From July 23, 1982, the date of filing of Bonnie's chapter 11, to at least mid-December of 1982 neither Karen nor Lontie disclosed their purported ownership of the 5,000 acres of land listed as an asset in their mother's chapter 11 proceeding. Additionally, they did not object to her offering for sale during that chapter 11 proceeding various tracts of that 5,000 acres nor did they voice an objection to proposed sales which, though not consummated, had times set for objection and called for hearing.

> No gift can be complete without the acceptance thereof by the donee . . . . The law presumes such acceptance in the absence of evidence to the contrary.

Mahoney v. Martin, 72 Kan. 406, 410, 83 P. 982 (1905) (emphasis added). In the instant case, Karen and Lontie's silence, their acquiescence in Bonnie's claim of ownership in the land, their employment by Bonnie (certainly this is a fact inconsistent with ownership - if Karen and Lontie owned the land, they should have employed Bonnie) and allowing Bonnie to sell the land all indicate that there was not an acceptance of the gift until at least February, 1983.

Therefore, the Court holds the transfer of the real estate to Karen and Lontie on May 19, 1982 was not an effective gift, because it lacked, and Karen and Lontie failed to prove, the requisite elements of a gift. Even if the burden of proof in this case was on Roy and the creditors, as Karen and Lontie argue, the Court would hold that Roy and the creditors have proved that a valid gift was not made. The Court holds there was no intent to make a transfer, nor was there an effective transfer before June 10, 1982. At that point, Bonnie as enjoined from transferring the property in any manner by the restraining order issued by the state court judge in the domestic relations actions. Accordingly, the Court holds that the owner of the real estate is the Bonnie Clemence Trust and not the debtors in this chapter 11 proceeding, Karen and Lontie Clemence. The Court makes no determination of the allegations of diminished capacity of Roy, fraud perpetrated on Roy, nor undue influence exercised to Roy's detriment. By this Court's holding today, the property is returned to the jurisdiction of the state court to be divided in the divorce proceeding pursuant to the state court's authority, in light of the agreements, wills and trusts since 1954, the statutory and case law factors, and in light of the allegations made by Roy.

The foregoing constitutes Findings of Fact and Conclusions of Law under Bankruptcy Rule 7052 and Rule 52(a) of the Federal Rules of Civil Procedure.

Dated at Topeka, Kansas this 24 day of February, 1984.

S/James A. Pusateri

CERTIFICATE OF MAILING

The undersigned certifies that a copy of the foregoing Memorandum of Decision was placed in the United States mail on the 24th day of February, 1984 addressed to:

Randall J. Forbes
CRANE, MARTIN, CLAUSSEN, HAMILTON & FORBES
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Carol A. Park
Assistant U. S. Trustee
501 U. S. Courthouse
401 North Market Street
Wichita, Kansas 67202

S/Sherryne M. Evans,
Secretary to:
JAMES A. PUSATERI
Bankruptcy Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

(FILED U. S. COURT OF APPEAL TENTH CIRCUIT 4-28-87, Robert L. Hoecker, Clerk)

(FILED 4-30-87 Ralph L. DeLoach, Clerk)
By S/_____ Deputy

IN RE	)
	)
KAREN KAY CLEMENCE AND LONTIE JOE CLEMENCE,	)
	)
Debtors,	)
	)
CITIZENS STATE BANK OF ABILENE; ROY DOUGLAS CLEMENCE and CHARLES ROY CLEMENCE,	)
	)
Plaintiffs-Appellees,	)
v.	)
	)
KAREN KAY CLEMENCE and LONTIE JOE CLEMENCE,	)
	)
Defendants-Appellants.	)

No. 84-2079
(D.C. No. 84-4256)
(D. Kan.)

A true copy

Teste

Robert L. Hoecker
Clerk, U. S. Court of
Appeals, Tenth Circuit

By S/Marie Talamas
Deputy Clerk

ORDER AND JUDGMENT

Before ANDERSON and BARRETT, Circuit Judges, and Thompson, District Judge.*

---

*The Honorable Ralph G. Thompson, Chief Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that the oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8(c) and 27.1.2. The cause is therefore ordered submitted without oral argument.

Defendants-debtors appeal from a district court order adopting the bankruptcy judge's decision in favor of plaintiff-appellant in this adversary proceeding brought to determine debtors' rights in certain Kansas real estate.

We hold that the district court correctly exercised jurisdiction over the parties and subject matter and followed proper procedures in its review of the case. We also concur in the detailed findings and thorough analysis of the merits by the bankruptcy judge and district court.

The judgment of the United States District Court for the District of Kansas is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT PER CURIAM

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE

ROY ARTHUR CLEMENCE, CONSERVATEE/DEBTOR; CHARLES R. CLEMENCE AND ROY D. CLEMENCE, CO - CONSERVATORS FOR ROY A. CLEMENCE	)	Case No. 85-40164

IN RE

LONTIE J. CLEMENCE AND KAREN K. CLEMENCE, CAPACITIES AS STOCKHOLDERS OF AND TRUSTEES FOR "THE BONNIE J. CLEMENCE TRUST, UTA 7/25/84"; BONNIE J. CLEMENCE, INDIVIDUALLY AND IN HER CAPACITY AS STOCK-HOLDER OF "THE BONNIE J. CLEMENCE TRUST UTA 7/25/84"	)	Filing Fee Paid $60.00 Regina Mitchell
Plaintiffs,	)	Adv. Proceeding No. 85-0278
v.		
ROY ARTHUR CLEMENCE, CONSERVATEE/DEBTOR; CHARLES R. CLEMENCE AND R. DOUGLAS CLEMENCE, CO-CONSERVATORS FOR ROY A. CLEMENCE	)	
Defendants.	)	

Filed Kansas City, KS
Dec. 9, 1985 Russell L. Brenner, Clerk
U.S. Court of Bankruptcy By_____Deputy

COMPLAINT FOR DECLARATORY JUDGMENT: THAT BY VIRTUE OF PRIOR JUDGMENT (DIVORCE DECREE), THE LANDS DESCRIBED IN A CERTAIN GENERAL WARRANTY DEED, DATED 5/19/82, DO NOT CONSTITUTE PROPERTY OF THE DEBTOR'S BANKRUPTCY ESTATE - UNLESS AND UNTIL THE SAID DEED BE ADJUDICATED TO BE INVALID

COME NOW Plaintiffs as above captioned, individually and as fairly representative of the body of "Stockholders" of the Bonnie J. Clemence Trust, UTA 7/25/84, a business trust, pursuant to Rules 23.1 and 23.2 of the Fed. Rules of Civ. Procedure and seek declaratory judgment, interpreting, finding, concluding and declaring that by virtue of the June 20, 1984 entry by the district court of Dickinson County, Kansas of its divorce decree, the lands described in a certain general warranty deed dated May 19, 1982, do not constitute property of the above captioned and enumerated bankruptcy estate - unless and until the said deed be adjudicated to be invalid as to Bonnie.

1. Plaintiffs make a part hereof as if fully and completely set forth verbatim herein and attach hereto, as "Exhibit A", a true and correct copy of a certain general warranty deed, purporting to convey all of Plaintiff, Bonnie Clemence's right, title and interest in the lands described therein.

2. Plaintiffs attach hereto, as "Exhibit B", a true and correct copy of a certain divorce decree entered June 20, 1984 by the district court of Dickinson County, Kansas by which that court, inter alia, made its final statuatory disposition of property and make the same a part hereof as if fully and completely set forth herein, verbatim.

3. Plaintiffs attach hereto, as "Exhibit C", a true and correct copy of a certain U.S. District Court order, entered on July 27, 1984 and make the same a part hereof as if fully and completely set forth verbatim herein.

4. The above named Debtor filed a voluntary Petition under 11 U.S.C. Chapter 11 on February 12, 1985.

5. This court has jurisdiction over this adversary proceeding by virtue of the provisions of 11 U.S.C. 1334.

6. The Debtor has listed, inter alia, over 5,000 (five thousand) acres of certain real property as described in the aforesaid "Exhibit A", on Schedule B-1 of his Statement of Property as filed herein, thereby claiming said real property as part of his bankruptcy estate above captioned.

7. The Debtor claims: (1) that the divorce decree entered on June 20, 1984 by the district court of Dickinson County, Kansas, awarded him whatever hypothetical right, title and interest that plaintiff herein, Bonnie Clemence, might have in the lands described in "Exhibit A", irrespective of the validity of "Exhibit A" as to Bonnie and (2) that by reason of the subsequent order of the U.S. District Court ("Exhibit C"), the divorce decree awarded him ownership and title to the lands described in "Exhibit A" - thereby claiming that "Exhibit C" purports to adjudicate that "Exhibit A" is invalid.

8. Conversely, Plaintiffs claim that "Exhibit C" - irrespective of its competency or validity, does not purport to adjudicate that "Exhibit A" is invalid and further that the divorce decree is to be given its literal construction: that Roy Clemence has absolutely no right, title or interest with respect to the lands described in "Exhibit A" unless or until "Exhibit A" be adjudicated invalid, as to Bonnie, Plaintiffs claim that the said divorce decree did not award the debtor any right, title or interest in the lands described in "Exhibit A", but rather that, as the divorce decree unequivocally states, that any conceivable interest of Roy Clemence (debtor herein) is expressly subject to the May 19, 1981 general warranty deed.

9. Plaintiffs claim that the lands described in "Exhibit A" therefore do not constitute a part of the above captioned and enumerated bankruptcy estate, by virtue of the within described divorce decree, by reason that "Exhibit A" is valid as to Bonnie Clemence and those claiming under her, irrespective of its validity as to her creditors.

WHEREFORE, Plaintiffs above captioned pray for judgment interpreting exhibits: "A", "B" and "C" and finding, concluding and declaring that irrespective of its competency or validity, "Exhibit C" does not purport to adjudicate that "Exhibit A" is invalid and that by virtue of "Exhibit B", the lands described in "Exhibit A" are not property of the above captioned and enumerated estate in bankruptcy, unless and until "Exhibit A" be adjudicated to be invalid, as to Bonnie and for such other relief as to the Court seems just and equitable.

Dated: this 9th day of December, 1985.

RESPECTFULLY SUBMITTED:

Signed _____
Lontie Joe Clemence, Pro Se
Individually; And as President,
Trustee and Stockholder of and
for THE BONNIE J. CLEMENCE
TRUST, UTA 7/25/84
Route 4
Abilene, Ks 67410

and

Signed_____
Karen Kay Clemence, Pro Se
Individually; And as
Registered Agent, Secretary.

Trustee and Stockholder of and
for THE BONNIE J. CLEMENCE
TRUST, UTA 7/25/84
c/o THE BONNIE J.
CLEMENCE TRUST, UTA
7/25/84;

Satellite Office:
Suite 215
7740 Metcalf
Overland Park, Ks
66204

Signed _____
Bonnie J. Clemence, Pro Se
Individually; And as
Stockholder of and for THE
BONNIE J. CLEMENCE TRUST, UTA
7/25/84
3012 W. 89th Terrace
Leawood, Ks.

THE BONNIE J. CLEMENCE TRUST
STATE OF KANSAS SEAL
CERTIFICATE OF MAILING

I, Karen Kay Clemence, the undersigned, do hereby certify that I did mail a true and correct copy of the foregoing postage pre-paid, this 9th day of December, 1984, addressed to the following, at their respective addresses, listed below:

Mr. Max M. Hinkle
LEHMAN, GUILFOYLE & HINKLE
306 N.W. Second St.
Abilene, Kansas 67410

And

Charles R. Hay
GOODELL, STRATTON, EDMONDS & PALMER
215 East Eighth Street
Topeka, Kansas 66603
Attorneys for Charles R.Clemence
And R. Douglas Clemence,
Co-conservators for Roy A. Clemence

Signed_____
Karen Kay Clemence

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE

ROY ARTHUR CLEMENCE, CONSERVATEE/DEBTOR; CHARLES R. CLEMENCE AND ROY D. CLEMENCE, CO - CONSERVATORS FOR RAY A. CLEMENCE	)	Case No. 85-40164
IN RE		Filed 12/13/85 Russell L.
LONTIE J. CLEMENCE AND KAREN K. CLEMENCE, INDIVIDUALLY AND IN THEIR SEVERABLE CAPACITIES AS STOCKHOLDERS OF AND TRUSTEES FOR "THE BONNIE J. CLEMENCE TRUST, UTA 7/25/84"; BONNIE J. CLEMENCE, INDIVIDUALLY AND IN HER CAPACITY AS STOCK-HOLDER OF "THE BONNIE J. CLEMENCE TRUST UTA 7/25/84" Plaintiffs,	)	Brenner, Clerk U.S. Court of Bankruptcy By_____ Deputy
v.	)	Adv. Proceeding No. 85-0278
ROY ARTHUR CLEMENCE, CONSERVATEE/DEBTOR; CHARLES R. CLEMENCE AND R. DOUGLAS CLEMENCE, CO-CONSERVATORS FOR ROY A. CLEMENCE Defendants.	)	

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT: THAT BY VIRTUE OF PRIOR JUDGMENT (DIVORCE DECREE), THE LANDS DESCRIBED IN A CERTAIN GENERAL WARRANTY DEED, DATED 5/19/82, DO NOT CONSTITUTE PROPERTY OF THE DEBTOR'S BANKRUPTCY ESTATE - UNLESS AND UNTIL THE SAID DEED BE ADJUDICATED TO BE INVALID;

COME NOW Plaintiffs above captioned, individually and who being fairly representative of the body of "Stockholders" of the Bonnie J. Clemence Trust, UTA 7/25/84, a business trust, pursuant to Rules 23.1 and 23.2 of the Fed. Rules of Civ. Procedure, seek declaratory judgment, interpreting, finding, concluding and declaring that the lands described in a certain general warranty deed dated May 19, 1982 hereinafter more fully described, do not constitute property of the above captioned and enumerated bankruptcy estate.

1. Plaintiffs make a part hereof as if fully and completely set forth verbatim herein and attach hereto as "Exhibit A", a true and correct copy of a certain general warranty deed dated May 19, 1982, which deed was filed for record with the office of the Register of Deeds in Dickinson County, Kansas, on April 25, 1983, and recorded at Deed Book 198, page 263.

2. Plaintiffs make a part hereof as if fully and completely set forth verbatim herein and attach hereto as "Exhibit B", a true and correct copy of a certain divorce decree entered in Dickinson County district court case no. 82-D-63 on June 20, 1984 and recorded in Judgment Docket "R" of the office of Clerk of the District Court of Dickinson County, Kansas at page 234.

3. Plaintiffs attach hereto, as "Exhibit C", a true and correct copy of a certain decision of the U.S. District Court for the District of Kansas, rendered under signature of U.S.

District Court Judge July 16, 1984 and entered in U.S. District Court case, civil no. 84-4256 in the U.S. District Court sitting in Topeka, Kansas on July 27, 1984, making the same a part hereof as if fully and completely set forth verbatim herein.

4. The above named Debtor filed a voluntary Petition under 11 U.S.C. Chapter 11 on February 12, 1985.

5. This complaint is an adversary proceeding within the meaning of Rule 7001 of the Bankruptcy Rules and one over which this court has jurisdiction by virtue of the provisions of 11 U.S.C. 1334, seeking the correct judicial interpretation and construction of the aforesaid Exhibits "A", "B" and "C" for declaratory judgment as to whether the lands described in "Exhibit A" constitute property of the above captioned and enumerated bankruptcy estate — owing to debtor's attempt to claim the lands as property of the above captioned bankruptcy estate and to inter alia, subject the said lands to the claims of his creditors in his effort to circumvent the literal construction of the divorce decree reflected in "Exhibit "C" in contentious opposition to Plaintiffs' claim that the deed reflected in "Exhibit A" is valid as to Bonnie Clemence (plaintiff herein) and those claiming under her — including the debtor.

6. The Debtor has listed, inter alia, over 5,000 (five thousand) acres of certain real property as described in the aforesaid "Exhibit A", on Schedule B-1 of his Statement of Property as filed herein, thereby claiming said real property as part of his bankruptcy estate above captioned.

7. The debtor bases his aforesaid claimed interest with respect to said lands on the divorce decree reflected in "Exhibit B" and claims that the said U.S. District Court decision (Ex "C") purports to adjudicate the May 19, 1982 general warranty deed (Ex "A") to be invalid and that the divorce decree (Ex "B") therefore vests him with title to the lands described in "Exhibit A".

8. By literal construction of Exhibits "A", "B" and "C", the lands described in "Exhibit A" do not constitute property of the above captioned and enumerated bankruptcy estate, since: (1) the divorce decree (Ex "A") and specifically adjudges that Roy Clemence (debtor herein) has absolutely no right, title or interest with respect to the lands described in "Exhibit A" unless and until "Exhibit A" be adjudicated invalid and (2) irrespective of its validity or competency, the U.S. District Court order (Ex "C") does not purport to adjudicate "Exhibit A" to be invalid.

COUNT I

[For Declaratory Judgment: That by virtue of the divorce decree (Ex "B"), the debtor is barred and/or estopped from claiming any right, title and/or interest in the lands described in "Exhibit A"; And said lands therefore do not constitute property of the debtor's bankruptcy estate, since — irrespective of its validity or competency — the U.S. District Court's Decision (Ex "C") does not purport to adjudicate the said deed to be invalid.

9. Plaintiffs re-state and re-allege, incorporating hereunder, all those statements and allegations contained in preceeding paragraphs numbered one (1) through eight (8); inclusive.

10. The lands described in "Exhibit A" do not constitute property of the debtor's bankruptcy estate, since: (1) the divorce decree reflected in "Exhibit B" expressly decrees that Roy's (the debtor's) claimed interest in said lands is subject to the May 19, 1982 general warranty deed ("Exhibit A") and specifically adjudges that Roy Clemence (debtor herein) has absolutely no right, title or interest with respect to the lands described in "Exhibit A" unless or until "Exhibit A" be adjudicated invalid, thereby barring or estopping the debtor from attempting to claim any right, title or interest in said lands, unless or until said deed be adjudicated to be

invalid as to Bonnie and (2) irrespective of its validity or competency, the U.S. District Court's decision reflected in "Exhibit C" does not purport to adjudicate the deed reflected in "Exhibit A" to be invalid.

COUNT II

[For Declaratory Judgment: That by virtue of the divorce decree (Ex "B"), the debtor is barred and/or estopped from claiming any right, title and/or interest in the lands described in "Exhibit A" and said lands therefore do not constitute property of the debtor's bankruptcy estate, since — irrespective of whether the U.S. District Court's Decision (Ex "C") purports to adjudicate "Exhibit A" to be invalid — the said district court decision is not valid as to Bonnie Clemence, nor as to her, entitled to full faith and credit and is therefore void]

11. Plaintiffs re-state and re-allege, incorporating hereunder, all those statements and allegations contained in preceeding paragraphs numbered one (1) through seven (7), inclusive.

12. Irrespective of whether the U.S. District Court's decision as reflected in "Exhibit C" purports to adjudicate "Exhibit A" to be invalid, the said district court decision is not valid as to Bonnie Clemence (plaintiff herein), or as to her entitled to full faith and credit, since the U.S. District Court which rendered its decision reflected in "Exhibit C" did not obtain the inpersonam jurisdiction over Bonnier, nor quasi in rem jurisdiction over her interests in property — requisite — to bind her or bar her claim that said deed is valid as to her, since (1) under "Exhibit A", Bonnie is predecessor in title to Lontie and Karen Clemence and therefore not privy to her said successors in interest and (2) neither said Lontie and Karen, nor their interests in the lands described in "Exhibit A", can be representative of Bonnie,

her interests in property or Bonnie's sole and absolute power, discretion and ability to convey her title via "Exhibit A", as per the terms and provisions of her trust referenced in said deed, which terms and provisions make Bonnie the sole conveyor of her title to the lands described in "Exhibit A".

13. Since the district court decision ("Exhibit C") is not valid as to Bonnie and fails to bind Bonnie or bar Bonnie's claim that the May 19, 1982 general warranty deed reflected in "Exhibit A" is valid as to her, said deed is valid as to her and those claiming under her — including the debtor herein — irrespective of its validity as to her creditors.

14. Since "Exhibit A" is valid as to Bonnie and those claiming under her, including the debtor herein, the district court decision reflected in "Exhibit C" — even if it could be construed to purport to adjudicate "Exhibit A" to be invalid — would be therefore void, for want of the inpersonam jurisdiction over Bonnie and quasi in rem jurisdiction over her interests in property, requisite to adjudicate "Exhibit A" to be invalid. The said U.S. District Court decision is therefore incapable confirmation or enforcement in any manner, to any degree and incapable of supporting the debtor's claimed interest under the divorce decree reflected in "Exhibit B" with respect to the lands described in "Exhibit A", since the debtor is bared and/or estopped by the divorce decree reflected in "Exhibit B", from claiming any right, title or interest in the lands described in "Exhibit A" unless or until "Exhibit A" be adjudicated to be invalid. The lands described in "Exhibit A" therefore do not constitute property of the above captioned bankruptcy estate.

WHEREFORE, plaintiffs pray for judgment, consistent with the aforesaid Counts I and/or II and abbreviated, via the following:

(I) As to both Counts I and II: interpreting the divorce decree reflected in "Exhibit B" and finding, concluding the declaring: (1) that the divorce decree

specifically adjudicates that Roy Clemence's (the debtor's) claimed interest with respect to the lands described in "Exhibit A" is expressly subject to the May 19, 1982 general warranty deed, reflected in "Exhibit A" and that Roy Clemence (debtor herein has absolutely no right, title or interest with respect to the lands described in "Exhibit A" unless and until "Exhibit A" be adjudicated invalid; and (2) that Roy is barred and/or estopped by the divorce decree from claiming any right, title or interest with respect to the lands described in "Exhibit A", unless and until the May 19, 1982 general warranty deed be adjudicated to be invalid.

(II) As to Count I: interpreting the U.S. District Court decision reflected in "Exhibit C" and finding, concluding and declaring that — irrespective of its validity or competency, the said decision does not purport to adjudicate that the May 19, 1982 general warranty deed, reflected in "Exhibit A" is invalid; OR IN THE ALTERNATIVE, as to Count II: interpreting said "Exhibit C" and finding, concluding and declaring that — irrespective of whether the said U.S. District Court decision could be construed to purport to adjudicate the May 19, 1982 general warranty deed to be invalid, the said decision is not valid as to Bonnie Clemence, nor as to her, entitled to full faith and credit and is therefore void, for want of the inpersonam jurisdiction over Bonnie and quasi in rem jurisdiction over her interests in property , requisite to adjudicate the May 19, 1982 general warranty deed invalid; And the May 19, 1982 general warranty deed, reflected by "Exhibit A" is therefore valid as to Bonnie Clemence and those claiming under her — including the debtor, Roy Clemence.

(III) As to both Counts I and II: that the lands described in "Exhibit A" do not constitute property of the above captioned and enumerated bankruptcy estate unless and until the May 19, 1982 general warranty deed as reflected in said "Exhibit A" be adjudicated to be invalid as to Bonnie

Clemence — irrespective of its validity as to her creditors; And for such other and further relief as to the Court seems just and equitable.

Dated: this day of December, 1985.

RESPECTFULLY SUBMITTED

_____

LONTIE JOE CLEMENCE, Pro Se
Individually and as President,
Trustee and Stockholder of and
for THE BONNIE J. CLEMENCE TRUST, UTA
7/25/84
Route 4
Abilene, Ks 67410

and

Signed_____
KAREN KAY CLEMENCE, Pro Se
Individualy and as Registered
Agent, Secretary, Trustee and
Stockholder of and for THE
BONNIE J. CLEMENCE TRUST, UTA
7/27/84
c/o THE BONNIE J. CLEMENCE
TRUST, UTA 7/25/84

Satellite Office:
Suite 215
7740 Metcalf
Overland Park, Ks 66204

and

BONNIE J. CLEMENCE, Pro Se
Individually and as stock-
holder of and for THE BONNIE
J.CLEMENCE TRUST, UTA 7/25/84
3012 W. 89th Terrace
Leawood, Ks

CERTIFICATE OF MAILING

I, Karen Kay Clemence, the undersigned, do hereby certify that I did mail a true and correct copy of the foregoing postage pre-paid, this 11th day of December, 1985, addressed to the following, at their respective addresses, listed below:

Mr. Max M. Hinkle
LEHMAN, GUILFOYLE & HINKLE
306 N.W. Second St.
Abilene, Kansas 67410

And

Charles R. Hay
GOODELL, STRATTON, EDMONDS&PALMER
215 East Eighth Street
Topeka, Kansas 66603
Attorneys for Charles R. Clemence
And R. Douglas Clemence, Co-
conservators for Roy A. Clemence

Signed_____
KAREN KAY CLEMENCE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

(FILED 1-30-86, Russell L. Brenner, Clerk, U. S. Court of Bankruptcy
By_____Deputy

IN RE:

ROY ARTHUR CLEMENCE, CONSERVATEE/DEBTOR; CHARLES R. CLEMENCE AND ROY D. CLEMENCE, CO-CONSERVATORS FOR ROY A. CLEMENCE
Case No. 85-40164

IN RE:

LONTIE J. CLEMENCE AND KAREN K. CLEMENCE, INDIVIDUALLY AND IN THEIR SEVERABLE CAPACITIES AS STOCKHOLDERS OF AND TRUSTEES FOR "THE BONNIE J. CLEMENCE TRUST, UTA 7/25/84"; BONNIE J. CLEMENCE, INDIVIDUALLY AND IN HER CAPACITY AS STOCKHOLDER OF "THE BONNIE J. CLEMENCE TRUST UTA 7/25/84"
Plaintiffs,

vs. Adv. Proceeding No. 85-0278

ROY ARTHUR CLEMENCE, CONSERVATEE/DEBTOR; CHARLES R. CLEMENCE AND R. DOUGLAS CLEMENCE, CO-CONSERVATORS FOR ROY A. CLEMENCE,
Defendants.

ORDER

Now on this 24th day of January, 1986, defendants Roy Arthur Clemence, conservatee-debtor and Charles R. Clemence and R. Douglas Clemence, co-conservators' Motion to Dismiss came on for hearing. The defendants appeared by counsel, Marta Fisher Linenberger of Goodell, Stratton, Edmonds and Palmer; plaintiffs appeared by Karen K. Clemence and Bonnie J. Clemence.

Upon hearing statements of the parties and upon consideration of the evidence, the Court finds that defendants' Motion to Dismiss should be granted on the grounds that the claims and issues presented in plaintiff's Complaint have already been determined by this Court and therefore are barred by res judicata and collateral estoppel.

IT IS THEREFORE ORDERED that plaintiffs' complaint and amended complaints in this matter are dismissed with prejudice.

IT IS SO ORDERED.

S/James A. Pusateri
United States Bankruptcy Judge

APPROVED BY:

S/Marta Fisher Linenberger
GOODELL, STRATTON, EDMONDS & PALMER
215 E. Eighth Avenue
Topeka, KS 66603-3999
913/233-0593

1/30/86 File-stamped copy mailed by First Class Mail to:
Lontie J. Clemence, Route 4, Abilene, KS 67410
Karen Kay Clemence, Satellite Office, Suite 215, 7740 Metcalf, Overland Park, KS 66204

Bonnie J. Clemence, 3012 W. 89th Terrace, Leawood, KS 66206
Marta Fisher Linenberger, 215 E. 8th, Topeka, KS 66603-3999
Max M. Hinkle, 306 NW Second, Abilene, KS 67410
Office of Ass't U. S. Trustee, 401 N. Market, Room 501, Wichita, KS 67201
Roy Arthur Clemence, Route 4, Abilene, KS 67410
S/_____Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:

ROY ARTHUR CLEMENCE, (No.85-40164)
Charles R. Clemence and
R. Douglas Clemence, Conservators,

Debtor.

LONTIE J. CLEMENCE and
KAREN K. CLEMENCE, Individually
and in their severable capacities
as stockholders of and trustees
for "The Bonnie J. Clemence
Trust, UTA 7/25-84,"

Plaintiff,

vs. (No. 85-0278)

ROY ARTHUR CLEMENCE, Conservatee/
debtor; Charles R. Clemence and
R. Douglas Clemence, co-conservator
for Roy A. Clemence,

Defendant.

(Adversary Proceeding)

ORDER NUNC PRO TUNC AND ORDER DENYING MOTION FOR REHEARING

Now on this 6 day of March, 1986, the Court determines that its order dated January 24, 1986 to reflect the true facts in this case, should be amended to read as follows:

"Upon hearing statements of the parties and upon consideration of the evidence, the court finds that defendants' Motion to Dismiss should be granted on the grounds that the claims and issues presented in plaintiff's Complaint have already been determined by this Court and the United States District Court for the District of Kansas and therefore are barred by res judicata and collateral estoppel."

The Court further finds that the plaintiff's motion for rehearing should be denied.

IT IS SO ORDERED.

S/JAMES A. PUSATERI
Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

(FILED 1-12-90, 2:31 PM)

IN RE:

LONTIE J. CLEMENCE and KAREN K. CLEMENCE, Individually and in their severable capacities as stockholders of and trustees for "THE BONNIE J. CLEMENCE TRUST, UTA 7/25/84"; BONNIE J. CLEMENCE, Individually and in her capacity as stockholder of "THE BONNIE J. CLEMENCE TRUST, UTA 7/25/84",

Plaintiffs/Appellants,

vs.

ROY ARTHUR CLEMENCE, Conservatee/ Debtor; CHARLES R. CLEMENCE and R. DOUGLAS CLEMENCE, Co-Conservators for Roy A. Clemence,

Defendants/Appellees.

Case No. 86-4091
(85-40164)
Adv. Proceeding (85-0278)

ORDER

This is a long-pending bankruptcy appeal. Appellants Bonnie J. Clemence, Lontie Clemence and Karen Clemence filed an adversary proceeding asking for declaratory judgement. Appellants sought a declaration from the Bankruptcy Court that certain lands described in a general warranty deed dated May 19, 1982 are not property of the estate of the debtor, Roy A. Clemence, until the deed is adjudicated invalid.

The bankruptcy court dismissed the adversary proceeding on the grounds that "the claims and issues presented in plaintiff's Complaint have already been determined by this Court and the United States District Court for the District of Kansas and therefore are barred by res judicata and collateral estoppel," The appellees have asked for summary affirmance on the same basis, noting, in addition, that the Tenth Circuit Court of Appeals affirmed the action of this District Court and the Bankruptcy Court.

We have reviewed the lengthy materials filed in this matter, including the appellants' brief, statements of the issues, and the transcripts of the proceedings before the Bankruptcy Court. Of course, we are familiar with the prior decision which was used by the Bankruptcy Court as grounds for dismissal of this matter. Nevertheless, we made another review of that decision, as well as the divorce decree which has been made part of the record and which is a significant part of appellants' argument.

The prior decision was rendered in a bankruptcy and adversary proceeding involving the same parties. The issue was whether Karen Clemence and Lontie Clemence owned the same land at issue here by reason of a general warranty deed dated May 19, 1982 and signed by their mother, Bonnie Clemence, and their father, Roy Clemence. This court adopted the following findings of the Bankruptcy Judge:

The transfer of the real estate to Karen and Lontie on May 19, 1982 was not an effective gift, because it lacked, and Karen and Lontie failed to prove, the requisite elements of a gift. Even if theburden of proof in this case was on Roy and the creditors, as Karen and Lontie argue, the Court would hold that Roy and the creditors have proved that a valid gift was not made. The Court holds there was no intent to make a transfer, nor was there an effective transferbefore June 10, 1982. At thatpoint, Bonnie was enjoined from transferring the property in anymanner by the restraining orderissued by the state court judge in the domestic relations actions.Accordingly, the Court holds that the owner of the real estate is the Bonnie Clemence Trust and not the debtors in this chapter 11 proceeding, Karen and Lontie Clemence. The Court makes no determination of the allegations of diminished capacity of Roy, fraud perpetrated on Roy, nor undue influence exercised to Roy's detriment. By this Court's holding today, the property is returned to the jurisdiction of the state court to be divided in the divorce proceeding pursuant to the state court's authority, in light of the agreements, wills and trusts since 1954, the statutory and case law factors, and in light of the allegations made by Roy.

Before this court adopted the above findings and while the adversary proceedings were pending, a state court in the divorce case between Roy and Bonnie Clemence issued an order dividing property so that certain land would go to Roy Clemence on the condition described as follows:

> "subject . . . to the final determination yet to be made by the United States Bankruptcy Court for the District of Kansas concerning the validity of a certain deed executed on the 19th day of May, 1982, by the parties as Trustees of the Bonnie J. Clemence Trust purporting to convey to Karen K. Clemence and Lontie J. Clemence certain tracts of land . . .

> Should the aforesaid deed be finally determined to be invalidit is the finding of this Court that the ownership of all lands described therein . . . should be set over to [Roy Clemence] . .."

Appellants contend that this court never decided that the deed was invalid, and therefore Roy Clemence cannot claim ownership of the lands described in the deed. While the court did not explicitly state that the deed was invalid, the court held the deed was ineffective (or invalid) to transfer interest in the land to Karen and Lontie Clemence because there was an absence of donative intent, delivery and acceptance—the essential elements of a gift. This holding satisfied the condition in the divorce decree because it established the ownership of the land at the time of the decree.

Hence, appellants' claim in this proceeding that the divorce decree bars Roy Clemence's claim to the land has already been decided by the operation of this court's decision and the divorce decree. This court held that the land belonged to the Bonnie Clemence Trust. The divorce decree then placed the land in Roy Clemence's ownership. The Bankruptcy Court was correct in making this purely legal determination upon a motion to dismiss.

The dismissal of the adversary proceeding is affirmed. This action is taken upon a full consideration of the matters filed before this court—not as a summary action upon appellees' motion. A copy of this order shall be transmitted to the Clerk of the Bankruptcy Court.

IT IS SO ORDERED.

Dated this 12th day of January, 1990
at Topeka, Kansas.

S/Richard D. Rogers
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

(FILED 2-22-91, U. S. COURT OF APPEALS
TENTH CIRCUIT, Robert L. Hoecker, Clerk)

IN RE:
LONTIE J. CLEMENCE and KAREN K. CLEMENCE, Individually and in their severable capacities as stockholders of and trustees for "THE BONNIE J. CLEMENCE, TRUST, UTA 7/25/84"; BONNIE J. CLEMENCE, individually and in her capacity as stockholder of "The Bonnie J. Clemence Trust, UTA UTA 7/25/84,"

Plaintiffs-Appellants,

v.

ROY ARTHUR CLEMENCE, conservatee/ debtor; CHARLES R. CLEMENCE AND R. DOUGLAS CLEMENCE, co-conservators for Roy A. Clemence,

Defendants-Appellees.

No. 90-3049
(D.C. No. 86-4091-R)
(D. Kansas)

ORDER AND JUDGEMENT*

Before MCKAY, MOORE, and BRORBY, Circuit Judges.

*This order and judgement has no precential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examing the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. p. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This is an appeal from a judgement of the District Court of the District of Kansas sitting as an appellate court in bankruptcy. The sole issue is whether the bankruptcy court correctly dismissed an adversary proceeding brought to determine whether 5000 acres of real property was that of the plaintiffs or that of the estate. The district court upheld the bankruptcy judgement that the issue had been resolved in prior actions, and we affirm the district court.

Plaintiff, Bonnie J. Clemence, is the mother of plaintiffs Lontie J. Clemence and Karen K. Clemence. Roy Clemence, who bankruptcy estate is a party defendant in this action, was the husband of Bonnie and the father of Lontie and Karen. The dispute here is whether Lontie and Karen are the owners of the real property as a result of a deed from Bonnie to them.

Bonnie executed a general warranty deed to Lontie and Karen dated May 19, 1982, purporting to convey the

5000 acres to them as a gift. The deed was not recorded until April 25, 1983. In the intervening period, a number of consequential events occurred.

First, and perhaps most important in the chain of events, in June 1982, Roy filed an action in state court first seeking separate maintenance and later a divorce from Bonnie. From what we can glean of the prolix briefs and the record, there is no dispute that the state court had jurisdiction over the properties of Roy and Bonnie and had authority to allocate their interests in those properties in accordance with state law.

Thereafter, on April 18, 1983, Lontie and Karen filed a chapter 11 proceeding in the District of Kansas. In that proceeding, the bankruptcy judge ultimately determined that Bonnie did not have donative intent to convey the property to Lontie and Karen when she executed the deed. He consequently held there was no "effective transfer before June 10, 1982," the date the state court acquired jurisdiction in the action between Roy and Bonnie. (1) He concluded the property was owned by "the Bonnie Clemence Trust and not the debtors [Lontie and Karen] in this chapter 11 proceeding." (Emphasis added.) The court then returned the property "to the jurisdiction of the state court to be divided in the divorce proceeding pursuant to the state court's authority." That judgement was appealed to the district court, which affirmed the bankruptcy court, and to this court which summarily affirmed the district court.

After the entry of the judgement of the bankruptcy court, the state court entered a decree of divorce. In that

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(1) The date is further significant because from that time Bonnie had been enjoined by the state court from conveying any interests in property.

decree, the state court awarded the 5000 acres to Roy,

> subject, however, to the final determination yet to be made by the United States Bankruptcy Court for the District of Kansas concerning the validity of a certain deed executed on the 19th day of May, 1982, by theparties as Trustees of the Bonnie J. Clemence Trust purporting to convey to Karen K. Clemence and Lontie J. Clemence certain tracts of land situated in Dickinson County and Ottawa County, Kansas .... Should the aforesaid deed be finally determined to be invalid it is the finding of this Court that the ownership of all lands described therein as well as the other lands described ... should be set over to the Plaintiff [Roy] as his sole and separate property, free and clear of all claims of the Defendant. Should said deed be finally determined to be valid then this finding shall have no bearing on the lands described therein.

It is not clear in the record before us, but we presume at the time of the decree the state court was unaware of the judgment of the bankruptcy court holding the purported transfer to Lontie and Karen ineffective. We have no doubt, however, that the state court intended to defer to the bankruptcy court's determination of whether Bonnie's deed effectively conveyed the 5000 acres to Karen and Lontie. We are equally certain that the state court intended to award the 5000 acres to Roy if the bankruptcy court held that transfer ineffective.

Succeeding the entry of the divorce decree by some eight months, Roy filed the bankruptcy proceeding from which this appeal emerged. In that proceeding, plaintiffs filed a pro se complaint, individually and "as fairly representative of the body of 'Stockholders' of the Bonnie J.

Clemence Trust" seeking a declaratory judgment that the 5000 acres "do not constitute property of [Roy's bankruptcy] estate - unless and until the said deed be adjudicated to be invalid as to Bonnie." Again, while the prolixity of the complaint obscures the clarity of its purpose, it appears that plaintiffs contended that because the bankruptcy court did not pronounce the word "invalid" when it held the purported conveyance from Bonnie to Lontie and Karen "ineffective," the divorce decree operated to vest title in the 5000 acres in Bonnie. (2)

Roy, as debtor, filed a motion to dismiss the complaint for failure to state a claim. Roy asserted the issue of

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(2) Plaintiffs attempted to file an amended complaint asserting that the first bankruptcy holding was invalid because the bankruptcy court did not have "in personam jurisdiction" over Bonnie, but the bankruptcy court did not permit the filing of the amended complaint. Consequently, the argument apparently raised in this court concerning the issue of "in personam jurisdiction" is without foundation.

the validity of the deed had been resolved against Karen and Lontie, and that holding was binding. After hearing the motion the bankruptcy court concluded the issues "have already been determined by this Court and therefore are barred by res judicata and collateral estoppel." The motion to dismiss was granted.

On appeal, the district court affirmed. The court held that contrary to plaintiffs' assertion, it did determine Bonnie's deed invalid. The court stated:

> While the court did not explicitly state that the deed was invalid, the court held the deed was ineffective (or invalid) to transfer interest in the land to Karen and Lontie Clemence because there was an absence of donative intent,

delivery and acceptance—the essential elements of a gift. This holding satisfied the condition in the divorce decree because it established the ownership of the land at the time of the decree.

We agree with this ruling. Plaintiffs' contention is utterly frivolous.

AFFIRMED. Mandate shall issue forthwith.

Entered for the Court

John P. Moore
Circuit Judge

RE: Rules of the United States
Court of Appeals for the Tenth
Circuit, adopted November 18, 1986.

HOLLOWAY, Chief Judge, with whom BARRETT and BALDCOCK, Circuit Judges, join, concurring and dissenting:

The revision of the Rules of the Tenth Circuit is highly commendable and it represents a monumental effort by several judges of the court and its staff. With appreciation, I join in the adoption of the Rules in all respects, except the provision in Rule 36.3 prohibiting the citation of unpublished opinions and orders and judgments, which is limited to citation for the purpose of demonstrating the law of the case, res judicata, or collateral estoppel.

The most important reasons for permitting citation of published precedents are just as cogent to me in the case of unpublished rulings. Each ruling, published or unpublished, involves the facts of a particular case and the application of law — constitutional, statutory or decisional — to the case. Therefore all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation. See Jones v. Superintendent, Virginia State Farm, 465 F.2d 1091, 1094 (4th Cir. 1972) (". . . any decision is by definition a precedent . . ."). No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule. (1)

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(1)

The Supreme Court has had two opportunities to rule on the constitutionality of the Seventh Circuit's no-citation rule, see 7th Cir. R. 35, but has not done so. In Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit, 429 U.S. 917 (1976), the Court, in a single sentence disposition, denied leave for the petitioners to file petitions for writs of mandamus and prohibition after the Seventh Circuit struck the petitioners' citation of an unpublished decision. In Bowder v. Director, Department of Corrections of Illinois, 434 U.S. 257 (1978), rec'g. 534 F.2d 331 (1976), the Court did not mention the no-citation question, although it had granted certiorari on the issue. See Reynolds & Richman, The Non-Precedential Precedent—Limited Publication and No Citation Rules in the United States Courts of Appeals, 78 Col. L. Rev. 1167, 1180 n.74 (1978) discussing Do-Right and Bowder).

In Jones v. Superintendent, Virginia State Farm, 465 F.2d at 1094, the Fourth Circuit expressed the view that its procedure for screening and disposing of cases by unpublished decisions "accords with due process" and the court's "duty as Article 3 judges." However, although the court said it would not treat its unpublished decisions as precedent and said it prefers they not be cited, it acknowledged that it "cannot deny litigants and the bar the right to urge upon us what we have previously done." 465 F.2d at 1094 (emphasis added).

In addition, at least one commentator has expressed concern over the due process and equal protection implications of no-citation rules adopted in the federal courts. Note, Unreported Decisions in the United States Courts of Appeals, 63 Cornell L. Rev. 128, 141-145 (1977).

Moreover, what will this court do if we know of a prior ruling which is controlling, although it was unpublished? We would clearly have the duty as a matter of basic justice to apply it, and in so doing logic would demand citing the earlier ruling.

See Reynolds & Richman, The Non-Precedential Precedent, 78 Col. L. Rev. at 1196-99.

The opposing considerations that may be said to justify the no-citation rule do not persuade me. First, a common reason given for the rule is that not all litigants or counsel have equal access to unpublished rulings. (2) Arguably such

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(2)

See, e.g., United States v. Joly, 493.2d 672, 676 (2d Cir.1974); Jones v. Superintendent, Virginia State Farm, 465 F.2d 1091, 1094 (4th Cir.1972).

Commentators have argued that the no-citation rule may work to increase rather than decrease the unfairness to the unitiated lawyer. "If . . . the sophisticated attorney uses arguments or language drawn from the unreported case without citing it, his uninitiated opponent is unlikely to learn of its existence . . . . In sum, if unreported opinions are cited, the unitiated lawyer can remedy his deficiency; if they cannot be cited, he may not even know a deficiency exists." Reynolds & Richman, The Non-Precedential Precedent, 78 Col. L. Rev. at 1199.

Irregularity gives an unfair advantage to federal and state governmental litigants and other large organizations which are frequent litigants with the means to maintain a filing system for such rulings. The argument fails, however, because we can implement some reasonable measures to adjust for such an imbalance, as we did earlier by similar measures. We can make the rulings, together with a simple index, available at our circuit library and can distribute the rulings to the clerks of the district courts, to the state bar associations, and to other depositories at law schools, without an undue burden. Making the rulings available in such places, with a rudimentary index,

will afford the public, the bar and the district judges reasonable access to our unpublished rulings.

Second, proponents of the no-citation rule argue that many of the court's rulings are not significant precedents and are in fact essentially decisions on factual issues only, or are merely applications of clearly established legal principles not meriting publication or citation. This suggestion is wholly unpersuasive to me. If this were truly the case, considerations of efficiency and economy would lead counsel to rely on published decisions, rather than dig for unpublished rulings, and we would not need a no-citation rule. See Kanner, The Unpublished Appellate Opinion: Friend or Foe? 48 Cal. St. B.J. 386, 446 n.75 ("[W]hy would any lawyer in his right mind go to the trouble of finding and citing unpublished opinions which merely reiterate rules and rely on precedents already larding the published reports") (emphasis in original). Furthermore, when we make our ad hoc determination that a ruling is not significant enough for publication, we are not in as informed a position as we might believe. Future developments may well reveal that the ruling is significant indeed. As we know, we are frequently changing our views on publication of decisions, deciding later to publish them on motions of the parties or on our own motion. The classifications are too fine in many instances and we cannot confidently say, in deciding whether to publish, that we are not working an injustice on parties in later cases.

Third, it may be suggested that in the rush of our business, we must prepare orders and judgments which are not written in the form of polished discourses which we wish to serve as citable opinions. This is the most untenable of the notions suggested for the no-citation rule. In light of our caseload, we are obviously driven to entering orders which are not the literary models that we would like to produce as opinions. Nevertheless, the basic purpose for stating reasons within an opinion or order should never be forgotten — that the decision must be able to withstand the scrutiny of analysis, against the

record evidence, as to its soundness under the Constitution and the statutory and decisional law we must follow, and as to its consistency with our precedents.